THE FRAGMENTS OF

THE PERPETUAL EDICT

OF

SALVIUS JULIANUS,

COLLECTED, ARRANGED, AND ANNOTATED

BY

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INTRODUCTION.

On Edicts in general.

Before entering upon a discussion of the plan on which Salvius Julianus drew up his famous Edict in the reign of Hadrian, it is absolutely necessary to say a few words on the nature of Edicts in general.

An edict, then, is an order emanating from some officer of state in relation to the matters over which he has jurisdiction[1]; and such edicts in early times were issued not only by civil magistrates, but by military commanders, priests, pontiffs and augurs. The phrase "edicere" is seldom, if ever, used in reference to the directions given by private persons, except in the bombastic phrases of the comedians and satirists; for even the written notices of ordinary citizens not holding office are designated *libelli*, and not *edicta*, almost invariably by prose writers, and very frequently by the comedians and satirists also, when the mention of such documents is merely collateral to the topic of their ridicule.

Sigonius asserts that the right of issuing edicts appertained only to those magistrates who were invested with *imperium*; and he further holds that *imperium* was a name applicable to an aggregate of three functions, inseparable according to the theory of Roman jurisprudence, viz. *jus edicendi*, *vocatio* and

[1] καὶ γὰρ διαγράμματα τῶν ἀρχόντων Ἕλληνες μὲν διατάγματα, Ῥωμαῖοι δὲ ἔδικτα προσαγορεύουσι. Plutarch, *Marcell.*

prensio; the two latter phrases signifying, respectively, the right of the magistrate to summon any citizen before his tribunal, and his right to arrest for contempt of summons or injunction, or by way of execution of a sentence pronounced. But to the theory of Sigonius there is the obvious objection that curule aediles, tribunes and pontiffs could issue edicts, although none of them had the *vocatio* and *prensio*[1]. It is more correct, therefore, to say that *imperium* has three meanings in Roman Jurisprudence; 1st the command in war, 2nd the power of life and death or minor punishment; 3rd the rights of *vocatio* and *prensio*, confining *prensio* to the forcible compelling of appearance on neglect of a *vocatio.* And not only did the *jus edicendi* attach to those who possessed any variety of *imperium*, but to state-officials generally, even when they were devoid of *imperium:* and so we conclude that the statement of Gaius, although so wide in its terms, is the closest admitted by the actual state of practice: "jus edicendi habent magistratus populi Romani[2]." Edicts, in fact, could be issued by all "qui honores gerebant," not merely by those "qui imperio gaudebant."

But although every magistrate could issue edicts, yet, as we have already said, his edicts were strictly confined to the matters over which he had jurisdiction. Consequently the edicts of the minor officials, however important in their day to persons obnoxious to their sanctions, are but of little interest to those who look back over a wide interval of time in order to detect in Roman practice, not the minutiæ which changes of circumstances and ideas have rendered impossible to be imitated, but those broader principles which are valuable for ever, whether as models for adoption, when their application has been productive of good, or as beacons of warning, when their application has led to evil.

Many of the edicts of the higher officials, again, are of comparatively little importance to us moderns, because they

[1] See Aul. Gell. *Noct. Att.* XIII. 13: Livy II. 56: IV. 54.

[2] Gai. *Comm.* I. 6.

were but temporary orders issued on the spur of emergencies, and not based upon any permanent and pervading principle. Those edicts alone are of abiding value, which were published in the true legislative form, viz. by anticipation.

And so we arrive at the well-known distinction between the Roman edicts, that some were *repentina*, some *perpetua*. The *edicta repentina* were proclamations in times of tumults[1], notices of games, public funerals, holidays, intercessions of the gods, levies of troops or ships, summary orders for the banishment of individuals or classes[2], &c. &c. Another variety of *edicta repentina* consisted of *decrees*, i.e. orders by way of execution of the laws, as, for example, citations of absconding defendants, judgments upon default of appearance, postponements of the hearing, orders for sale of confiscated goods. So that *edicta repentina* are usually and appropriately classified into *edicta reipublicae administrationis causa* and *edicta de negotiis forensibus.*

Edicta repentina of the former variety are akin to the *θέμιστες* of Homer, except that *θέμιστες* were purely arbitrary, whereas in a settled society *edicta* are arbitrary in form rather than in reality, being as a matter of fact issued almost entirely in accordance with precedent. In communities barely emerging from barbarism, judicial utterances are subject to no rule but the pleasure of the chieftain or magistrate who enuntiates them, and are binding through the religious sanction, the prince being regarded as the mouthpiece of God. All nations have, doubtless, in their infancy passed through a stage when *θέμιστες* or *edicta repentina* were the sole forms of legislation, or perhaps it would be more correct to say the sole form of government: nor was the primeval condition of Rome an exception, if we accept the description of Pomponius: "et quidem initio civitatis nostrae populus sine lege certa, sine

[1] For instance, that none but voters should enter the City at an election: Appian *de Bell. Civ.* I. p. 164. See also Sueton. *Octav.* 53: *Calig.* 6, 18 : *Tit.* 8.

[2] E. g. the well-known edict of Claudius that the Jews should leave Rome.

jure certo primum agere instituit, omniaque *manu* a regibus gubernabantur[1]."

But this blind submission to authority is incompatible with advancing civilization; the divinity of an obviously fallible king or chieftain is by degrees scouted; the wise men of the tribe invade his functions, or at any rate compel his edicts to be consistent one with another; and so the way is paved for a new kind of edict, *edicta perpetua.*

The process is very gradual. *Edicta* long remain *repentina* in form: but an edict once issued begins to serve as a precedent in similar cases as they arise, and the king (or if the state has, according to the usual sequence of events, become changed into an oligarchy, the magistrate) is constrained by the sentiments of the aristocracy, or influential portion of the community, to abide by custom.

Next begins direct legislation: so that the ground covered by edictal regulations is continually circumscribed, at the same time that the *edicta* themselves tend to become stereotyped. *Edicta repentina* of an anomalous kind are still issued on the occasion of great emergencies, but edicts in general become so much a matter of course, that the citizens can tell beforehand the nature of that which will be published in any particular instance. And thus we arrive at the period when *edicta perpetua*, truly so-called, universal edicts, prospective and not retrospective, issued by those who are Judges in name, but Legislators in reality, become an important part in the juristic scheme of a nation. These edicts are not absolutely "perpetual" in a temporal sense; but are, at any rate, unchangeable without some formal notification, and apply to all persons in a certain class of cases.

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[1] D. I. 2. 2. I. Just as *manus* originally denoted the unrestrained power possessed by the head of a family over his children, wife, slaves and chattels (see Maine's *Ancient Law*), so here, undoubtedly, the word denotes the unbounded prerogative of the ancient Roman king, holding at his absolute disposal, as *parens patriae*, the lives, liberty and property of his subjects.

History of Edicts at Rome.

And now, to revert to the history of edicts at Rome, when the regal government was overthrown in B.C. 509, the kingly functions, so far as they were not assumed by the Senate, were divided between the Pontifices and the Consuls. The Pontifices were invested with the sacerdotal authority previously belonging to the King; the Consuls succeeded him in the command of the army, the presidency of the Senate and the administration of the Law. In two at least of these capacities they would, of course, have his powers of issuing *edicta repentina:* nay, as supreme judges, they possessed, according to Pomponius, even larger discretion; for that writer tells us that the regal laws were entirely abolished, and that for twenty years the Roman state was governed by custom alone, which we may fairly understand to have been custom as declared by the consular edicts. "Exactis deinde regibus, lege tribunitia omnes leges hoc exoleverunt, iterumque coepit populus Romanus incerto magis jure et consuetudine aliqua uti quam perlata lege; idque prope viginti annis passus est." D. 1. 2. 2. 3.

The passing of the Twelve Tables doubtless curtailed to a large extent the Consuls' power of indirect legislation; but the brevity of this famous code would still have left them abundance of scope for interference, if new restraining influences had not arisen; firstly through the turbulence of the times, which must have furnished the Consuls with such incessant occupation as generals that they could have had but little time to devote to their judicial and semi-legislative functions; secondly through the superstitious reverence which a rude populace feels for the written law, merely because it is written, and which would induce the Romans to resist additions or improvements in their code, however much they might suffer from its imperfection. The Consuls, therefore, for a generation or two, scarcely ventured at all to alter the structure or enlarge the application of the statute law; and further, the regulation of procedure passed into the hands of the priesthood, a class

generally little inclined to innovate[1]. Therefore in the fourth century from the foundation of Rome, the procedure was by *legis actio*, or, in other words, by technical ceremonial forms appointed in the laws themselves, or laid down by the priests according to a strict interpretation of the laws, and as immutable as the laws themselves[2]: the legislation was by direct enactment of the Comitia Centuriata or Senate; and *edicta perpetua* were in abeyance. The inefficiency of the Consuls in their judicial capacity was remedied in part by the institution of the *decemviri stlitibus judicandis* and the *centumviri*. Heffter is of opinion that the former court alone existed before the creation of the Praetor's office[3]: Ortolan[4], on the contrary, considers that prior to that event the Centumviri had cognizance of questions of state, Quiritarian ownership and succession; and, if we may judge by his silence, considers that the Decemviral Court was not then in existence. But, if we may be allowed to hazard an opinion, both Courts were in existence prior to B.C. 366, just as both continued to exercise jurisdiction long after that year in which the Praetor Urbanus came into being. There are classical references which indicate this; but we must confess there is little to show us how jurisdiction was apportioned between the two; unless we take for granted that what was the rule in Cicero's time had always been the rule, viz. that the Decemviri (no doubt besides other cognizance) had the settlement of disputes concerning liberty[5].

The authority of the Pontifices in matters of procedure was, according to Pomponius, brought to an end by the publication of their occult rules as to days and forms by Cnaeus Flavius, the freedman of Appius Claudius[6].

Apparently therefore the Romans were greatly in want of some authority to enlarge and improve their procedure in

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[1] Pomponius in D. I. 2. 2. 6. [2] Gai. *Comm.* IV. II.

[3] Heffter, *Obss. ad Gai. Comm. IV.*, cap. III.

[4] Ortolan, *Histoire du droit Romain*, §§ 171—173.

[5] Cic. *pro Caecin.* 33: *pro domo*, 29.

[6] Pomponius in D. I. 2. 2. 7.

B.C. 366. The older system of *edicta* had fallen into abeyance, and the *legis actiones*, fit only for a ruder civilization, had become immutable; the act of Flavius having destroyed the authority of the Pontifices, so that no functionary now existed with even the limited power or inclination to introduce amendments which they had once possessed.

But in that year, B.C. 366, the plebeians wrested one of the consulships from the patricians, and the latter by way of compensation had three new curule offices created to which only members of their order were eligible, the Praetorship and the two Curule Aedileships[1]. To the Praetor was delegated that cognizance of private suits, which up to the time of his creation had appertained to the Consuls and Pontifices; and by degrees he appropriated also a considerable amount of the jurisdiction of the Decemviri and Centumviri: to the Aediles was entrusted the management of the games, the custody of the public buildings, streets, forum, markets, &c. These magistrates, then, succeeding to the functions of other magistrates who had possessed the *jus edicendi*, were themselves invested with the same prerogative, and exercised it far more freely than the Consuls of latter days had done; so that devoting their whole attention, the one to judicial matters, the others to affairs of police, they speedily began to work reforms which had been almost impossible when such business formed but an appendage to the military and political functions of ambitious Consuls, or to the sacerdotal functions of Pontiffs, who regarded with superstitious reverence the institutions derived from the deified founders of Rome, or contained in that Decemviral legislation which had been sanctioned beforehand by the utterance of the Delphic oracle.

Originally and properly the Praetor was merely a Judge. It was his business to *administer* the law established by the

[1] The plebeians expostulated against the unfairness of this arrangement; and it was allowed at first that the Curule Aediles should be patricians and plebeians in alternate years; later, that they should be always chosen from the two orders indiscriminately.

Twelve Tables and supplemented by the later enactments of the Comitia and Senate: but the manner of administration or the mode of procedure was left in a great measure to his own discretion[1]. Hence he did not ostensibly reform the law; but steadily and openly improved the forms of process, paving the way for the abolition of the *legis actiones* and the introduction of the system of *formulae:* in which undertaking he was encouraged and supported by the growing dislike of a people advancing in civilization for cumbrous and useless ceremonies[2]. Still in the law itself he indirectly and covertly worked an immense improvement, by making the procedure of his court applicable to wide classes of cases not provided for by the letter of the civil law: and notably he took in hand the great subject of *possession*, which the *jus civile* had ignored[3]. This extension he worked almost entirely by the introduction of those *fictions*, on which Gaius discourses so largely in his Commentaries[4]. But the Praetor during the days of which we are now speaking, the two centuries between the institution of his office and the subjugation of Achaia, seldom, or perhaps we may say never, legislated directly. Popular feeling supported him in his covert improvements of the law, whilst the people's superstitious reverence for ancient rules debarred not only him, but even the Comitia and the Senate[5], from sweeping and undisguised innovation. Yet, though the Praetor was never allowed to confer a right or to invent a remedy utterly un-

[1] See Austin's *Jurisprudence*, Lecture XXXV.

[2] Gai. *Comm.* IV. 30.

[3] Savigny, *on Possession*, Bk. I. ch. 13.

[4] Gai. *Comm.* IV. 32, 38. Maine's *Ancient Law*, ch. 2.

[5] The Senate from the earliest times had a large legislative power, on account of the inconvenience of convening the Comitia too frequently. The Comitia also delegated to them discretionary power in many matters. The Comitia became more and more difficult to employ as a legislative body, and so "quia difficile plebs convenire coepit, populusque multo difficilius in tanta turba hominum, necessitas ipsa curam reipublicae ad Senatum deduxit." Pomponius in D. 1. 2. 2. 9.

known to the old law, still when a manifest wrong was being suffered, he was allowed to declare in his Edict, i.e. in his collection of *edicta perpetua*, (the permanent edictal system being now fully revived,) that the sufferer should have an action on the palpably false hypothesis that he was not the person that he was, or that the circumstances which technically but inequitably barred his claim were non-existent. Hence, annually —for the Praetorship was a yearly office—an Edict of the *perpetual* or universal character was promulgated, in which it was declared, firstly, that in a multitude of specified cases the Praetor would grant an action on behalf of those who had suffered a wrong against the enduring of which the laws had made provision; and, secondly, that he would further grant an action in a variety of other instances where a wrong fell within the spirit, though not within the letter, of the laws.

Thus far matters had progressed previously to the creation of the second Praetor, the Praetor Peregrinus, about the year B.C. 244.

But before we proceed to consider the influence which his institution had on the course of Roman Jurisprudence, we must revert once more to the consideration of "perpetual" as distinguished from "repentine" edicts. In early times the edicts would, as we have already said, be entirely of the repentine character; and so possibly they were again when the Praetor Urbanus first resumed this mode of legislation; but the necessity that the citizens should know their rights and remedies must by degrees have constrained him, as well as the Pontifices, Consuls and other magistrates, to publish their rules in advance. At any rate, almost as soon as we have clear records of what took place at Rome, the Praetor (for of his doings we know most,) published at the beginning of his year of office the rules by which he intended to act, reserving to himself nevertheless the power of changing any of them from time to time. To this collection of premonitory edicts began to be applied the title of The Edict; and the epithet Perpetual was added to denote that the rules were *general* and of *permanent* operation, that is to say, of force until

duly revoked by their author. As each Praetor naturally accepted in the main the principles of his predecessors, a distinction was gradually made between the adopted and the novel portion of the Edict, and so we read of *edicta tralatitia* and *edicta nova* as the two varieties of the *edicta perpetua* comprised in the Edictum Perpetuum.

When the Praetor Peregrinus was appointed to decide those suits in which the parties were foreigners, he too published an Edict; which from its very inception must obviously have been in character and contents totally different from the Edict of the Praetor Urbanus. The latter functionary was not allowed to legislate except through fictions: the other was appointed for the very purpose of legislating, since the Jus Civile ignored the rights of foreigners, whether against Romans or amongst themselves[1]. For a long time therefore the novel part of the Edictum Peregrinum must have borne an important, almost an overwhelming, proportion to the tralatitious part, as new points arose and were determined. So too in the Provinces, when additional Praetors were created to direct their administration, and to decide suits amongst the natives themselves or between Romans and other strangers and the natives; although the former variety of litigation may have been chiefly settled according to the local laws, yet edicts were needful for the other; and these edicts, like those of the Praetor Peregrinus, must have contained even more substantive law than procedure[2].

Thus the function of the Praetor Urbanus was at the outset solely to provide procedure for the enforcement of the Jus Civile: but the Praetor Peregrinus and the Praetores Provinciales, until they invented a system of law, would have nothing which their procedure could enforce.

When the inferior Praetors were thus actively legislating,

[1] See Austin's *Jurisprudence*, Lecture XXXI.

[2] The Sicilian and Sardinian Praetors were created in B.C. 227: the two Spanish Praetors in B.C. 197. Sulla added four more Praetors: Caesar two: and the number was in later times still further increased.

the force of example, if not also the fact that the Praetor Urbanus looked forward to a Provincial Praetorship as a sequence to his first office, and would therefore be qualifying himself to some extent for his new duties whilst still engaged upon the old; the fact also that the duties of Urbanus and Peregrinus were sometimes lodged in the hands of the same man[1]; both these facts would increase the inclination of the Praetor Urbanus to break through the closely-drawn trammels of the Jus Civile, and introduce into his Edict modifications founded on natural equity, based, that is to say, upon the notion that there is a divine and absolute standard of right and wrong, independent of and superior to mere human enactment[2]. At the epoch when this leavening influence was at work there occurred the event to which all Jurists unite in ascribing so much influence upon the development of Roman Law, viz. the welcoming of Greek Philosophy to the Sovereign City in consequence of the absorption of Greece into the Roman State.

The Praetor Peregrinus and the Praetores Provinciales had been forming a code to be applied to the solution of questions amongst *peregrini*, the natives of the dependent provinces, and between Romans and these subject foreigners. They had arrived at their system by comparing the laws of the different peoples under the sway of Rome, by selecting the common principles of their jurisprudence, and by welding the whole together and filling up the gaps by what they called Equity, their own notions, or rather the notions of the Juris Consulti who were held in such high repute at Rome, of the method whereby the principles adopted where amalgamation was feasible should be extended to instances where no amalgamation could be brought about. This system of compromise and extension had enabled them to concoct a code, the fairness of which all Romans recognized; although their national prejudices forbad them to allow its superiority over the obsolete

[1] Livy, XXV. 3, XXV. 41, XXXVII. 50.

[2] "Aequitas est laxamentum juris." Cicero.

and intricate system on which their own rules of conduct were based and under which their own litigation was conducted. Prejudice alone therefore barred the entrance of equity into the Edict of the Praetor Urbanus, and unreasoning prejudice needed only some powerful influence to overturn it utterly. That influence was provided when Greek Philosophy became the new and popular study at Rome. Then the Romans suddenly learned to believe that there had in ancient days existed upon earth a perfect code, obeyed by all men in common during the mythical Golden Age, when the whole world formed but one society, when separation of nations, war, discord, injustice were unknown: and that this Lex Naturae, if it could but be recovered and observed, would be the great panacea of human misery.

All existing codes were corrupt, for every nation had through ignorance, prejudice or misfortune perverted the primeval Lex Naturae, and framed for itself a debased and distorted law.

Then it struck the practical Romans that the theory of their speculative neighbours might be utilized, if the relics of the Natural Code were recovered by collecting those rules and practices observed universally, or at any rate by a large number of nations; and that the residue of the same system might be brought again into existence if the deficiencies in the restored code were supplemented by regulations accordant with those that were regathered. And this they saw at once was the process which had long been followed out by the Praetor Peregrinus; and yet his Edict had been judged worthy of application to the disputes of foreigners only, whilst Romans had claimed as their proud inheritance the pure and unadulterated, or, as it was now seen to be, the corrupt and perverted, Jus Civile. The conclusion was obvious: that the citizens had at hand a noble approximation to the lost Lex Naturae, and yet, when it was within their very grasp, abandoned it to subject nations.

Hence it resulted that popular feeling, powerful everywhere, but especially potent in a democracy, thenceforward

encouraged the Urban Praetor in making bolder innovations in his Edict, till by degrees he brought it into a form closely resembling that of the Edict of the Praetor Peregrinus.

This is the reason why Roman Law as set forth in the Edict, in the Commentaries which the great Jurists wrote upon the Edict, and in the Digest of Justinian compiled from the writings of the Jurists, is so invaluable. The law contained in these sources is not special, but general: it is not that of one State, compiled when it was isolated and semi-barbarous, as it would have been if the Urban Edict had come down to us in the form which it bore in the third, or perhaps even in the second, century before Christ; or if we had possessed only the still earlier rules of the Twelve Tables: the Roman Law we now study is a law drawn from the jural systems of every nation of importance at a time of high civilization, and tempered by the influence of a profound philosophy.

This great change in the character of the Urban Edict brought it into such close connection with the Edictum Peregrinum, that after the age of Cicero we rarely find the two mentioned separately. Edictum Urbanum becomes a phrase denoting the combined edicts of the Praetor Urbanus, Praetor Peregrinus and Aediles Curules, and is opposed to the Edicta Provincialia; which, of course, from local circumstances exhibited much diversity, both one from another, and the whole of them from the Edict of the City[1].

[1] "As a consequence of the incorporation of the Jus Gentium with the law peculiar to the Urbs Roma, the Jus Gentium, as a separate system, eventually disappeared. For the proper Roman Law, having adopted and absorbed it, became applicable to the cases which it had been made to meet: that is to say, to civil questions between citizens of Rome and members of the communities which Rome had subdued, or between members of any of those communities and members of any other. And by consequence, the office of the Praetor Peregrinus fell into disuse; and the Edicts of the Presidents in the various provinces were thereafter exclusively occupied with purely provincial interests." Austin's *Jurisp.* XXXI.

Gradual extension of the cognizance of the Praetor Urbanus.

We have shown why the Praetor Urbanus became inclined to innovate in the most sweeping manner, and why this inclination was fostered by the sentiments of the people. It now becomes needful that we should notice how the sphere within which he could operate gradually enlarged itself between the year B.C. 366, when the Praetorian office came into existence, and that year in the reign of Hadrian, which was the date of Julian's Edict. And here we enter upon a discussion replete with difficulties. Almost every writer has views of his own on the changes effected by the Lex Pinaria, the Lex Aebutia and the Leges Juliae: the dates of these Leges can only be fixed conjecturally, their character is affected by their dates, and even if the latter could be ascertained with certainty, innumerable disputable points would remain. All therefore that we can do is to suggest a coherent and consistent hypothesis, admitting that it is but an hypothesis; and we here state at the very outset that although we agree with Heffter in the main, yet some of his reasonings we cannot follow, and from some of his conclusions we feel bound to dissent.

When the Praetorship was first created, the holder of that office divided the jurisdiction in civil suits with the Centumviri and Decemviri stlitibus judicandis: but steadily and without retrogression we find him sweeping into his own court the matters once belonging to the cognizance of the others.

The Lex Pinaria, in whatever way we read the disputed passage in Gai. *Comm.* IV. 15, points to the fact that within a very few years from the date of the creation of the Praetor[1] there had sprung up a custom in his court of referring cases to an umpire or single juror (*arbiter judexve*) sitting privately, instead of settling them summarily *in jure* according to the

[1] The Lex Pinaria is usually assigned to the year B.C. 350. If, however, the other date, B.C. 308, be adopted, this will not materially affect our argument.

directions of the Twelve Tables[1]. / And if in that passage from Gaius we accept the reading "dabatur e Xviris die xxx judex," suggested by Heffter, we may argue that the Decemviri had through some cause or other been relieved from so large a part of their judicial functions, that they had time to devote to an occupation analogous in many respects to that of our modern jury: i.e. an individual taken from their body was the single juryman in a praetorian Sacramentary Cause[2]. If then their business as judges had been diminished, we may argue, (not conclusively we admit, but with a high degree of probability,) that it was the newly created official, the Praetor, who had ousted them from some portion of their jurisdiction.

But the change effected by the Lex Pinaria is of little importance compared with that introduced by the Lex Aebutia. The process in the older courts was by *legis actio;* that in the Praetorian Court was by *formula:* and whether the *judex* to whom the trial of the *formula* was remitted was always one of the Decemviri, as provided by the Lex Pinaria, or sometimes a Decemvir and sometimes a private individual, we shall not attempt to settle: although we are strongly inclined to believe that the *judex* was always a private individual, except in sacramentary causes.

The Lex Aebutia abolished the *legis actiones* in a large variety of cases, which thus passed from the cognizance of the Centumviri or Decemviri to that of the Praetor. Heffter's argument here seems most cogent, that whilst leaving a portion of the sacramentary actions to be decided by the Centumviral Court (those of that character which had appertained to the Praetor's jurisdiction now becoming matters of *formula*), the Lex Aebutia swept away altogether the *legis actiones per judicis postulationem* and *per condictionem;* thereby in all probability almost annihilating the judicial functions of the Decemviri,

[1] "Ni pagunt, in Comitio aut in foro ante meridiem causam conjicito: quom perorant ambo praesentes, post meridiem praesenti stlitem addicito." XII Tab. I. § 7.

[2] See Abdy and Walker's *Gaius and Ulpian*, App. (N).

and seriously curtailing those of the Centumviri; and ordained that in all causes wherein these modes of procedure had previously been customary litigants should thenceforth proceed *per concepta verba*, i.e. by *formula*[1]; or, in other words, should present themselves in the Praetor's Court.

Thus between the passing of the Lex Aebutia and the enactment of the Leges Juliae, or between B.C. 171 and B.C. 25[2], the following seems to have been the apportionment of legal business:

[1] See § VII. of Heffter's *Obss. ad Gai. Comm. IV.*, where, amongst other authorities, certain passages from Cicero are quoted, viz. one from *de Off.* 15: "dolus malus etiam legibus erat vindicatus, ut tutela XII tabulis, et circumscriptio adolescentium lege Plaetoria, et *sine lege judiciis*, in quibus additur: *ex fide bona. Reliquorum* autem *judiciorum* haec verba maxime excellunt: in *arbitrio* rei uxoriae, *melius aequius:* in fiducia, ut *inter bonos bene agier:*" and one in *de Off.* 17: "Q. Scaevola, pontifex maximus summam vim dicebat esse in *iis arbitriis* in quibus adderetur *ex fide bona;* fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, etc. In his magni esse judicis statuere quid quemque cuique praestare oporteret." Both of these passages indicate a division of *judicia* into those *lege* and those *sine lege*, correspondent to the *judicia legitima* and *judicia imperio continenti* of Gai. *Comm.* IV. 103—109, not, however, based on those artificial distinctions as to nationality of parties, place of trial and number of *judices* or *recuperatores*, which had been adopted in Gaius' day, but on a difference which the very nomenclature shows to have been the primary one, viz. whether the issue arose under civil or praetorian law. In further support of his view Heffter proceeds to quote a well-known sentence in the oration *pro Rosc. Com.* § 5, where Cicero alleges that a topic is dealt with "perinde ac si in formulam actionis omnia judicia legitima, omnia arbitria honoraria conclusa et comprehensa essent."

Hence Heffter concludes that between the passing of the Lex Aebutia and the enactment of the Leges Juliae there existed a division of jurisdiction somewhat of the character we set down above.

[2] "By searching for the year in which there were tribunes of the name of Aebutius, we are brought down to a period between B.C.

(1) The Centumviri had cognizance in a wide range of suits, the subjects of which are specified in that famous passage of Cicero: "jactare se in causis centumviralibus in quibus usucapionum, tutelarum, gentilitatum, agnationum, alluvionum, circumluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum vel ratorum, caeterarumque rerum innumerabilium jura versentur:" *De Orat.* I. 38.

(2) The Decemviri had cognizance in suits of liberty, and their process was *per manus injectionem.*

(3) Either the Centumviri or Decemviri adjudged in cases tried *per pignoris capionem.*

(4) The Praetor tried *per formulam* the suits, principally on contract, which had formerly been the matter of the *legis actiones per judicis postulationem* and *per condictionem.*

(5) The Praetor also tried *per formulam* a large number of novel cases, for which in his Perpetual Edict he had granted rights of action previously unknown at Rome.

The Leges Juliae of Augustus again enlarged the scope of the Praetor's jurisdiction and diminished that of the two other tribunals. The *legis actiones per manus injectionem* and *per pignoris capionem* were abolished in all but a few cases: the greater part of the *actiones in rem* were made matters of *formulae,* and so removed from the Centumviral Court: and the *judices* to try issues emanating from the court of the Praetor were from that period invariably private individuals. Possibly, however,

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234 and B.C. 171. The earliest of these dates is that usually fixed upon, but it appears the least admissible. Looking at the connection of the dates alone,—first, at the Lex Silia, which created the *condictio,* probably in B.C. 244; secondly, at the Lex Calpurnia, which extended the *condictio,* probably in B.C. 234; thirdly, at the Jus Aelianum which published the *actiones legis,* and at the same time made certain additions to them in B.C. 202; looking at these facts we shall be justified in rejecting the year B.C. 234 as that in which the Lex Aebutia was promulgated, and giving the preference to the year B.C. 177 or 171." See Ortolan's *Histoire du droit Romain,* Section XLVII., § 245.

as we have already remarked, the Lex Aebutia had previously relieved the *decemviri* from their duty of acting as *judices*.

Thus in the days of Julianus the Decemviral Court had disappeared: the Decemviri had been invested with a new office, that of presidents of the Centumviral Tribunal, and the latter Court had become simply a Court of Probate and Administration, possessing possibly also a jurisdiction in suits concerning liberty, gifts and one or two other matters[1]. All other causes went before the Praetor and were triable *per formulam*.

The Perpetual Edict of Salvius Julianus.

The Praetorian Edict, as we have already pointed out, had from early times been "perpetual" in the sense that it was universal, and moreover could not be changed by the Praetor without notice. And the next point to be noticed in its history is the effort made, eventually with success, to constrain each Praetor to abstain from innovations during his year of office; so that the Edict when once published should for a twelvemonth be unalterable. The first attempt in this direction is said to have been made by Aemilius Paulus in B.C. 169, twenty-nine years prior to the subjugation of Achaia. He proposed a senatusconsultum: "ne praetores edicta sua saepius per annum mutarent;" but this senatusconsultum, on which it was attempted to place a *veto* at the moment of its proposal, was either disregarded or, as some think, actually revoked. Verres, at any rate, when in Sicily, published new edicts at his pleasure: whence it has been argued that the Sc. Aemilianum had been formally rescinded; but the vigour with which Cicero assails Verres on this head tends to show that usage, if not also law, was against such changes[2]. The question was, at any rate, set at rest by the Lex Cornelia, B.C. 67, three years after the condemnation of Verres, "ut praetores ex perpetuis edictis suis jus dicerent:" and thenceforward the Urban and Provincial Edicts were in the main

[1] As to this debateable point, see Heffter's *Obss. ad Gai. IV.* § 9.
[2] Cic. *in Verr.* Act. II., I. 41—47.

"tralatitious." Innovations for personal and sinister objects could rarely be made in advance, and changes for public utility would become less frequently necessary as the Praetorian Law became stable and comprehensive.

The Edict, it is true, was still considered to emanate from the authority of the Praetor, and to be void of legislative sanction; so that in theory each magistrate could consult his own pleasure in accepting or rejecting any part of his predecessor's publication. But constant revision by degrees purged away what was useless, and modifications in minor points or additions absolutely demanded by the change of circumstances were alone tolerated. Thus Cicero speaks of the Edict as a portion of the customary law of Rome[1].

The Edict having thus become stable, Commentaries began to be written upon it, several of which are named by Pomponius, notably those of S. Sulpicius, A. Ofilius, Antistius Labeo, Masurius Sabinus, &c. Ofilius in fact, just as Salvius Julianus afterwards, is said "to have drawn up an Edict[2]:" but this work of Ofilius probably never received legislative sanction. It seems to have been a portion of the great scheme entertained by Julius Caesar of simplifying actions and codifying the law, a project which fell through after his assassination[3].

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[1] *De Invent.* II. 22.

[2] "Praetoris edictum primus diligenter composuit." D. I. 2. 2. 44.

[3] Both Pompey and Caesar planned a revision and consolidation of the *legis actiones* and of the law itself. Masurius Sabinus carried out the first part of the scheme, but the other portion was reserved for Salvius Julianus. Tac. *Ann.* III. 27. Sueton. *Caesar*, 41, 44.

The *legis actiones*, (or rather *sacramentum*, the only *legis actio* surviving in full vigour in Julian's day,) being the form of procedure in the Centumviral Court, and the work of Sabinus being the standard authority on the subject, we have two sets of Commentaries quoted largely in the Digest, those *ad Edictum*, dealing with Praetorian Law, and those *ad Sabinum*, dealing with matters Sacramentary.

The Edict therefore continued to be a fully-recognized portion of the Roman Law, although merely of that character which Austin describes as "judiciary" or "indirect," until A.D. 131; when Hadrian empowered Salvius Julianus, the Praetor of the year, to frame an Edict by comparison of the Edicts of all former Praetors, Urban, Peregrine and Provincial: and by a senatusconsultum embodied this Edict in the Statute Law of Rome[1].

This is the Edict which in every sense of the word may be styled "Perpetual;" being unalterable except by the same authority which had sanctioned it, viz. the Emperor legislating through the Senate, in the mode which had then become customary. Though, at the same time, Hadrian himself acknowledged the impossibility of any Code being able to meet every contingency or change of circumstances, by appending the saving clause: "ut si quid in edicto positum non inveniatur, hoc ad ejus regulas, ejusque conjecturas et imitationes posset nova instituere auctoritas[2]."

On this Edict were composed the Commentaries of Julianus himself, Pomponius, Ulpianus, Gaius, Paulus, &c.; and it is from observation of the arrangement of these Commentaries, as evidenced by the method of their citation in Justinian's Digest, that we arrive at our knowledge of the order of topics in the Edict, and thence can frame what we hope will be considered a plausible theory as to the principle on which Julian and the Praetors who lived before him classified their subjects.

We take four only of these explanatory treatises as our guides: those of Julian, Gaius, Ulpian and Paulus. Pomponius wrote a treatise in 190 books or more on the Edict, but the references to his work in the Digest are comparatively so scanty that from them we can get but little clue. But from the four Commentaries we have just named, written by the four greatest lawyers Rome ever produced, and who lived almost contemporaneously, we are able to glean much information.

[1] C. 1. 17. 3. 18: C. 1. 17. 2. 10. [2] C. 1. 17. 2. 10.

For we observe almost at a glance that although their commentaries vary greatly in the number of the books or sections into which they are divided, yet the order of their quotation by Justinian (or rather by Tribonian) shows that, with very trifling exceptions, they commented on the same subjects in the same order. That order moreover differs in parts considerably from the order of topics observed in the Digest: and we conclude that Tribonian and his sixteen colleagues, when they received the commission from Justinian to arrange their exposition of Roman Law, "tam secundum nostri constitutionem codicis, quam edicti perpetui institutionem, prout hoc vobis commodius patuerit[1]," paid far more attention to the former part of the injunction than to the latter. For if the Digest, as the case really stands, differs in its arrangement from the arrangement of the four Jurists, whilst they on the other hand all agree in a remarkable way one with the other, they too living close upon the time of the issuing of the Perpetual Edict, Tribonian's committee 400 years later; it seems most clear that the Jurists must have followed some model, which Justinian's lawyers to a certain extent neglected; and that no model was so obvious an one for them as the Edict itself.

Julian appears to have written 90 books of Digesta, the first 58 dealing with the Praetorian Edict, the others probably with the Sacramentary Subjects, i.e. testaments, gifts, manumissions, and also with the Criminal Law.

Gaius wrote not only his well-known Institutionum Commentarii, but two much longer treatises, one inscribed "Ad Edictum Urbicum," the other "Ad Edictum Provinciale." The commentary on the Urban Edict does not help us in settling the order of topics adopted by the Praetor, as its books are not numbered, but designated according to their subjects: but the other Commentary is divided into 30 (or 32 if we include the last two upon the Aedilitian Edict) numbered books, and is most valuable as a guide[2].

[1] Just. "de Conceptione Digestorum" 5.

[2] It is not to be supposed from the titles of the works of Gaius

Ulpian wrote a Commentary Ad Edictum in 83 books, and like Gaius devoted the final two to the explanation of the Aedilitian regulations.

Of Paulus three works have reached us: the Sententiae Receptae, in a tolerably perfect form: the 23 books Brevium or De Brevibus, and the 80 Ad Edictum, only in fragments scattered throughout the Digest. But enough remains to show us that the order of subjects in the Sententiae, in the De Brevibus and in the larger Commentary was the same, and almost identical with that in the previously-named works of Julian, Gaius and Ulpian[1].

Scheme of the Edict.

The scheme of the Edict we have attempted to explain by means of a running commentary; but for the sake of reference we here summarize the results at which we have arrived.

The Edict began with a Prooemium or Preface, containing a small number of regulations which could not very well be classified in any of the Four Parts which followed, but were necessary for the understanding of subsequent directions.

The First Part then proceeded to treat of the initial proceedings in a regular action at law; viz. those prior to the appearance of the parties *in jure*, and those transacted *in jure*. These were principally

1. The Editio Actionis:
2. The Vocatio in Jus:
3. The Postulationes:

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that there were *two Edicts*. It is perfectly certain that there was only one: although possibly there were in that one some few rules of application only in Rome, and some few to be applied only in the provinces. But Gaius wrote *two distinct Commentaries*, on one and the same Edict; one for the use of Romans, probably therefore brief and presuming a knowledge of ordinary legal principles, the other more voluminous and more thoroughly explanatory.

[1] In writing the preceding pages much use has been made of Puchta's *Cursus der Institutionen*, I. 313—362, and Savigny's *System des Heutigen Römischen Rechts*, Vol. I.

4. The settlement of the Vadimonium:
5. The appointment (when needful) of a Cognitor or Procurator:
6. The providing of Sureties for Safe Custody or Ratification:
7. The issue of the Formula by the Praetor to the Judex.

But in this portion of the Edict several other matters were introduced parenthetically, such as *Transactiones* or Compromises, and Pacts generally: Infamia, as a disqualification for personal appearance in a suit: Restitutio in Integrum: Settlement by Arbitration.

The Second Part of the Edict dealt with the subsequent proceedings in an action, those *in judicio:* which were

1. The Hearing of the Evidence by the Judex.
2. The Award in accordance with the Condemnatio of the Formula.

This second part of the Edict therefore is principally devoted to an explanation of the points necessary to be proved or disproved in actions: and to that end *edicta monitoria* are given, specifying the facts on which actions may be grounded; and *formulae* are subjoined showing how these material facts are to be stated briefly and clearly for the consideration of the *judex.* These *formulae* were fixed in form, and as much a portion of the Perpetual Edict as the *edicta monitoria* themselves. Probably, when *sponsiones*, *restipulationes* or *satisdationes* formed a part of the process in any case, these also were inserted under the proper *edictum monitorium.*

The arrangement of the actions or *judicia* in this Second Part is throughout technical and dependent far more on the formal character of the remedy than on the nature of the plaintiff's claim; and thus bears out the remark of Austin, though not exactly in his own sense of the expression, "that even the substantive law introduced by the Edicts of the Praetors was implicated with procedure[1]."

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[1] Austin's *Jurisp.* Lect. XXXV.

The principle of the classification is as follows. Actions have reference either to things themselves or to the possession of things. Things again may be subdivided into tangible things, i.e. things in the stricter sense, *res;* and incorporeal things, i.e. obligations or rights to tangible things. Again, tangible things or *res* are of one or other of two well-marked classes, viz. *res in patrimonio nostro*, and *res extra patrimonium nostrum.* Hence we have in the Edict a primary classification of actions, according to the subjoined scheme:

Judicia
- de rebus
  - de rebus (stricto sensu)
    - de rebus in patrimonio nostro ...(i),
    - de rebus extra patrimonium nostrum ....(ii),
  - de obligationibus ....(iii),
- de possessione rerum ....(iv).

Each of the great heads, (i), (ii), (iii), (iv) above, has its subdivisions. Thus *judicia de rebus*, *de obligationibus*, *de possessione rerum* are distributed as follows:

(i) Judicia de rebus in patrimonio nostro
- de dominio (judicia in rem)
  - de dominio universitatis rerum ....(A),
  - de dominio singulae rei (B),
- de damno rei dato ....(C),
- de partitione rei ....(D),
- de re exhibenda ....(E).

(ii) Judicia de rebus extra patrimonium nostrum ....(F).

(iii) Judicia de obligationibus
- de rebus creditis ....(G),
- ex bona fide ....(H),
- ex jure familiarum ....(I).

(iv) Judicia de possessionibus
- universitatis ....(K),
- rerum soli ....(L),
- hominum et rerum mobilium ......(M).

Heffter, following de Weyhe, maintains that the arrangement of the *judicia* was entirely settled by consideration of the *legis actiones* which they had replaced: so that first came the actions which had originally been litigated *per sacramentum*, then those *per judicis postulationem*, thirdly those *per condictionem*, lastly those *per manus injectionem.* To begin with, he observes very truly, *vindicationes* or *actiones in rem* were, until the passing of the Leges Juliae, entirely matters of *sacramen-*

tum; and so they are put first: he further argues that the actions *de damno* and *de partitione* were in olden times settled *per judicis arbitrive postulationem*, and so are placed next in the Edict, some praetorian actions in reference to damage, and the *judicia de re exhibenda*, often preliminary to suits for damage, being conjoined with them. The *judicia de rebus creditis*, as every one knows, replaced the ancient *actiones condictitiae:* and for this reason come next in the Edict; and are followed by the *condictiones incerti* and *judicia ex bona fide*, which are akin to them, although of more modern creation and springing in great part from the *imperium* of the Praetor.

Thus far the theory of Heffter carries conviction with it. He then proceeds to state that the fourth part of the Edictal tabulation of actions opened with the *judicia de furtis;* and that these were classed with the suits *de operis libertorum, de legatis, de operis novi nunciatione, de liberali causa, de vectigalibus* and *de re judicata*, (which last-named topic we have remitted to the third part of the Edict,) because all these were originally litigated *per manus injectionem.* He further adds that in his opinion no part of the Edict was framed with reference to the old *pignoris capio*, which, he says, many Jurists considered to be no *legis actio* at all. But although Gaius informs us that this idea had had supporters, he takes the opposite view himself, and mentions instances where even under the formulary system a *pignoris capio* was presumed as the foundation of a suit[1]. Heffter, moreover, is not quite consistent with himself, for he speaks of *pignoris capio* in the old-fashioned proceedings *de vectigalibus*, &c. The weak point in this concluding part of his theory is that he nowhere satisfactorily explains the placing of the titles *de dotibus* and *de tutelis* just before the title *de furtis:* nor does he account for the insertion in their acknowledged positions of the topics of *bonorum possessiones, testamenta, bona vi rapta*, and *injuriae.* It seems to us therefore that he rather overstates his case; and whilst we acknowledge that the scheme of the old *legis actiones* was to some extent

[1] Gai. *Comm.* IV. 29, 32.

Julian's guide in arranging his Edict, yet we believe that he did not absolutely tie himself down to the plan, and more particularly that in the latter part of the third and in the fourth branches of actions (as we have arranged them), in those, that is to say, treating of family obligations and possessions, he conjoined the subjects of the old *actio per manus injectionem*, those of the *actio per pignoris capionem*, and a few others originally dealt with *per sacramentum*.

Rudorff's theory is even more simple than that which we advocate. He holds that long before Hadrian's time the initial proceedings in suits had become simple and uniform: but that the succeeding steps, those *in judicio*, exhibited an almost infinite variety, according to the nature and object of the action. Hence, he observes[1], "we must admire the genius of Julian in his treatment of the *formulae;* for he simply divides them into those which deal with 'things and demands,' *res ipsas et petitiones*, and those which deal with 'possessions'; observing that the former class are entirely intended to benefit plaintiffs, whereas the latter are for the benefit of defendants," i. e. for the benefit of persons who become plaintiffs in a preliminary suit, in order to obtain a possession which in subsequent proceedings *de rebus aut petitionibus* will give them the advantage of becoming defendants. If, however, we hold with Savigny that the Praetorian legislation was originally occupied with possession[2],—(which the Praetor invented, so to speak, and recognized as a distinct right separate from property, whilst the Jus Civile had acknowledged no legal possession apart from property,)—then we may consider more simply that Julian's division was according to a reversed chronology, the first great branch of his classification of *formulae* embracing *res et petitiones*, the matters with which the Praetor had interfered latest in point of time, the second branch the *possessiones* which he had originally made his special care.

In the Third Part of the Edict we have rules as to the

[1] Preface to *Fragm. Edict. Perpet.* p. 4.

[2] Savigny *on Poss.* Bk. I. ch. 13.

effect of a Judgment or Confession; and as one of these consequences was Possessio Bonorum, we have a long digression on the various causes out of which Possessio Bonorum may originate, and the rules and *formulae* connected therewith.

These three parts therefore contain a full account of Actions from their earliest to their final stage.

The Fourth Part deals with those remedies which spring directly from the Praetor's *imperium.*

Actions could be set on foot at the pleasure of a plaintiff; for so long as he applied for his *formula* with due ceremony, and alleged facts which according to some enactment warranted its issue, the Praetor granted the action as a matter of course, being but the minister of the Law, and having no discretionary power to withhold the remedy sought. So also when the defendant put in an answer which *ipso jure* destroyed the plaintiff's claim, the Praetor could but draw up a *formula* and remit the investigation of the facts to a Judex. But there were other cases in which the Praetor granted a relief not known to the Jus Civile.

He granted Interdicts, but not because the Law ordered him to do so under certain circumstances: the Law was ignorant of such remedies, and the Praetor himself decided in what cases, they should be allowed. The Praetor also granted Exceptions, i.e. allowed equitable answers to be put in, when a defendant had no legal reply to give in answer to the plaintiff's claim. He further compelled the parties to enter into Praetorian Stipulations in many cases where the Law made no such provision.

It is not meant that he acted without rule in these matters: he had rules of the most stringent character; but he made those rules himself; and did not merely carry out directions embodied in the Leges, Senatusconsulta and Constitutiones. So that the rules on which are based the topics of the Fourth Part of the Edict, viz.

1. Interdicts,
2. Exceptions,
3. Praetorian Stipulations,

are styled not inappropriately by modern jurists *Auctoritates*: because they find Gaius speaking thus of Interdicts—and his words, or at any rate those in his first sentence, are equally applicable to Exceptions and Praetorian Stipulations: "Certis ex causis Praetor aut Proconsul principaliter *auctoritatem suam* finiendis controversiis interponit. Quod tum maxime facit, cum de possessione aut quasi-possessione inter aliquos contenditur[1]."

It is probable that the Edict merely set forth the interdict, exception or stipulation itself, and very seldom enunciated in the form of a set rule the *auctoritas*, or principle on which it was founded. The Interdicts, Exceptions and Stipulations conveyed their own meaning, and for two reasons required no explanation; firstly, because they were additional remedies supplementing the various *formulae*, and such *edicta monitoria* as were requisite had been already given in the Second Part of the Edict; secondly, because these Praetorian remedies were, as a rule, modern in their origin, and consequently couched in less formal and difficult language than the *formulae*, which followed the words of the older *leges*. The few *edicta monitoria* which we find in the Fourth Part are in general tacked on to some interdict to limit or define its application, not premised in explanation of the reason of its issue.

This final portion of the Edict may be tabulated thus:

A. Interdicta.
- (α) De Universitate:
- (β) De Rebus Singulis:
  - i. divini juris:
  - ii. publici juris:
  - iii. privatis:
    - (*a*) De praediis:
    - (*b*) De juribus praediorum:
    - (*c*) De hominibus liberis:
    - (*d*) De servis et rebus mobilibus:
    - (*e*) De pignoribus.

[1] Gai. *Comm.* IV. 139.

B. Exceptiones.

C. Stipulationes Praetoriae.

We have but to add that in each division of the Edict the topics were arranged under Rubrics; which rubrics we have reason to suppose were copied verbatim, or with very slight alteration, by Tribonian into the Digest. For in the first place the antiquated language of the headings in the latter work indicates that they were quotations and not compositions of Justinian's Committee: and again we have abundance of direct evidence that there were rubrics in the edict, and those quoted as existing in that document tally with those found in the Digest. Thus, to mention a few out of the many proofs that could be alleged, we have in Gai. *Comm.* IV. 46: "Caeterae quoque formulae quae sub titulo DE IN JUS VOCANDO propositae sunt:" in D. 3. I. I. pr. "DE POSTULANDO. Hunc titulum Praetor proposuit:" in D. 4. I. I. pr. "DE IN INTEGRUM RESTITUTIONIBUS. Utilitas hujus tituli non eget commendatione:" in D. 43. I. 2. 3, "Recuperandae possessionis causa interdicta proponuntur sub rubrica UNDE VI:" in D. 50. 16. 195. 3, "ut in edicto Praetoris ostendimus sub titulo DE FURTIS:" &c., &c.

But although Tribonian retained the Rubrics, he purposely abstained from quoting the Formulae, because even so early as the reign of Constantine they had ceased to be employed. The Interdicts on the other hand he quoted in their original terms, not as set forms, but because their modern and comprehensive wording made them serviceable as models even under the "extraordinary system" of pleading. Thus from the Digest we gather a large number of *edicta monitoria*, and almost the whole of the *rubricae* and *interdicta;* whilst from the Commentaries of Gaius, from Cicero, and from other sources we can recover a small portion of the *formulae.* The *exceptiones* and *stipulationes* can also in some cases be restored from authorities quoted specially in our text.

Editions of the Fragments of Julian's Edict.

Till the discovery of the MS. of Gaius by Niebuhr in 1816, the *arrangement* of the surviving fragments of the Edict was rarely attempted, although many *collections* of the fragments were made. Such *restorations* as were taken in hand were in general founded far too much upon mere conjecture, and did not create confidence. But in the work of Gaius, which so wonderfully combines depth of knowledge with simplicity of exposition, two things were discovered : firstly, a clue to the Praetorian arrangement, which suggested the importance of the numbering of the books in the Commentaries upon the Edict compiled by Julian, Ulpian, Paulus and Gaius himself, and quoted so frequently in the Digest: secondly, a large number of the *formulae* which had been subjoined to the *edicta monitoria* in the Edict, and which throw such a flood of light upon Roman procedure. Hence originated the notable restitution of Rudorff, which unfortunately we had not an opportunity of perusing till the present edition was half completed, otherwise we should have made as much use of it at the beginning as at the end of our work.

The editions of the Fragments of the Edict most valuable for their completeness and accuracy are those of Brissonius (about 1570); Ranchinus (1595); Westenberg (indicated by uncial type in his admirable analysis of the Digest, published in 1712); Heineccius (1744), somewhat too speculative and audacious[1], and left unfinished at his death; de Weyhe (1821), largely quoted by Heffter in his well known Commentary on Gaius IV.; Haubold (1821), whose edition has been re-edited and slightly improved by Haenel in 1857 and by Giraud in 1873 : and Rudorff, preeminent above all for genius combined with caution (1869).

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[1] But be it noted that Heineccius, although it is somewhat the fashion to abuse him for precipitancy, is one of the most valuable of modern Roman Law writers, and possessed a knowledge of legal antiquities almost unapproachable.

In the text of this edition we have chiefly followed the versions of Pothier (1819), Westenberg, Rudorff and Giraud. Beck's edition of the Digest (1829) has also been of much service, as Beck prints in capitals all admitted or supposed quotations from the Edict occurring in Justinian's text. Pothier's version is in the main that of Ranchinus, with a few alterations and additions suggested by Gothofred, but is too full of hypothetical restorations; Giraud's, as already stated, is almost identical with Haubold's.

In quoting from the sources, the numerical method of citation has been adopted: thus Inst. 1. 2. 3 signifies Justinian's *Institutes*, first book, second title, third paragraph, and D. 4. 3. 2. 1 means The Digest, fourth book, third title, second law, first paragraph. The letters J, G, P, U, so frequently recurring, designate respectively the Digesta of Julian, the Commentarii ad Edictum Provinciale of Gaius, the longer work of Paulus ad Edictum, and the Commentarii ad Edictum of Ulpian. When other legal works are mentioned their titles are given at length. Where an edict is quoted verbatim by one of the four great Jurists, we denote the fact by printing his initial and the number of the book of his Commentary without a bracket: when, however, the Jurist alludes to the substance of the edict and does not give the exact words, the initial and number are placed within a bracket. Italics are used to indicate conjectural restorations of a text.

PROOEMIUM.

I. SI QUIS JUS DICENTI NON OBTEMPERAVERIT.

Si quis jus dicenti non obtemperaverit, *quanti ea res erit intra annum adversus eum judicium dabo*[1].

D. 2. 3. rub.: 2. 3. 1. 4. U. 1.

II. DE CAUTIONE ET POSSESSIONE EX CAUSA DAMNI INFECTI DANDA.

Dum ei qui aberit prius domum denuntiari jubeam[2].

D. 39. 2. 4. 5. U. 1. (P. 1.)

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[1] This probably was the very first clause in the Edict, making compulsory all its rules and every decision pronounced in accordance with them; i.e. sanctioning the whole *edictum perpetuum* and every legal *edictum repentinum*. The disobedience actionable was, of course, disobedience to the ultimate, not to the intermediate sanctions: for any contravention of the latter merely led on to the next stage of execution. D. 2. 3. 1. 1.

"Hoc judicium non ad id quod interest, sed quanti ea res est concluditur." D. 2. 3. 1. 4.

"The penalty is not measured by the personal injury done to the plaintiff (the magistrate), but is proportionate to the contempt exhibited towards his office."

Why Ulpian and Paulus treated of this topic at the very beginning of their Commentaries is difficult to determine. We presume they did so because it was mentioned in the same early place by the Praetor, but this hypothesis only replaces one difficulty by another. The subject, at any rate, is resumed further on, and there we shall annotate upon it. Vide infra, Partis Secundae § LXXX.

Heineccius suggests that in the Prooemium of the Edict there were rules as to the jurisdiction of the municipal magistrates:

III. DE FUGITIVIS.

Qui fugitivum apprehendit in publicum deducere jubebo.

D. 11. 4. 1. 3. U. 1.

IV. DE VADIMONIO ROMAM FACIENDO[1].

D. 50. 16. 2. (G. 1. P. 1. U. 2.)

V. DE ALBO CORRUPTO.

Si quis id quod jurisdictionis perpetuae causa, non quod prout res incidit, in albo, vel in charta, vel in alia materia propositum erit, dolo malo corruperit, dabo in eum quinquaginta aureorum judicium, quod populare est[2].

D. 2. 1. 7. pr. U. 3. (G. 1. P. 3.)

Rudorff adopts the same view: and this certainly appears to be the best explanation of the miscellaneous fragments, numbered II, III, IV. above.

[1] *Vadimonium,* bail for appearance, was demanded after the *vocatio in jus;* and therefore rules connected with it seem somewhat out of place here. Yet *vocatio in jus* is discussed by Paulus in the 4th book of his Commentary, and by Ulpian in the 5th of his work upon the Edictum Provinciale, whereas both of them seem to have annotated on *Vadimonia* in their first books: so that we are driven to the conclusion that Salvius Julianus also had removed this topic, or at any rate a part of it, from its proper place, and inserted it in that earlier portion of his Edict which, for convenience of reference, is designated the Prooemium. Possibly he did so because the inferior magistrates had frequently to bind over defendants to appear before the Praetor. See the remarks of Rudorff and Heineccius in the preceding note. Some of the leading rules about *Vadimonia* will be found in Gai. *Comm.* IV. 184—187.

[2] This action lies against anyone who maliciously falsifies or alters the *edictum perpetuum* after its publication. The perverter of an *edictum repentinum* does not come within its scope. It is "popular," or, in other words, can be brought by any person, and the penalty goes to the prosecutor. "In popularibus actionibus, ubi quis quasi unus ex populo agit." D. 3. 3. 43. 2

The *aureus* according to Dio Cassius = the *solidus* = 25 *denarii:* which again = 100 *sestertii* or 400 *asses*, as the *denarius* after B.C. 217 contained 16 *asses* and the *sestertius* 4.

VI. QUOD QUISQUE JURIS IN ALTERUM STATUERIT, UT IPSE EODEM UTATUR[1].

Qui magistratum potestatemve habebit, si quid in aliquem novi juris statuerit, ipse quandoque adversario postulante eodem jure uti debet.

Si quis apud eum qui magistratum potestatemve habebit, aliquid novi juris obtinuerit, quandoque postea adversario ejus postulante eodem jure adversus eum decernetur; scilicet ut quod ipse quis in alterius persona aequum esse credidisset, id in ipsius quoque persona valere patiatur.

D. 2. 2. 1. 1. U. 3. (P. 3.)

Praeterquam si quis eorum contra eum fecerit qui ipse eorum quid fecisset. D. 2. 2. 1. 4. G. 1.

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1 This edict is levelled at those who issue or procure decrees contrary to the *jus civile* or the *edictum perpetuum*.

"Any person who during his tenure of magistracy or office has laid down an unjust rule to another's hurt, shall himself abide thereby at a future time on the demand of any opponent of his.—Any person who has obtained from a magistrate or officer an unjust rule, shall be dealt with on that selfsame principle, if his adversary make demand thereof: in fact he must allow that rule to be applied to himself which he considered fair to be applied to others.—Except when such magistrate or litigant shall have been acting against any one who had himself previously offended in either of these respects."

Magistratus = an urban office: *potestas* = an office in the provinces. D. 2. 1. 13. 1.

Novum = *iniquum;* Ulp. in D. 2. 2. 3. pr.: "wilfully perverted;' Paulus in D. 2. 2. 2. pr. Compare the expression in Tacit. *Ann.* II. 30: "callidus et *novi* juris repertor Tiberius."

Adversario = any opponent whatsoever, not merely the person aggrieved by the original ruling.

PARS PRIMA.

DE ACTIONIBUS IN JURE INSTITUENDIS[1].

I. DE EDENDO.

Qua quisque actione agere volet, eam prius edere oportet[2].
D. 2. 13. 1. pr. U. 4. (G. 1. P. 3.)

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[1] The first portion of the Edict treats of the proceedings in an action previous to the *litis contestatio;* including those acts which were performed *in jure* prior to the redaction of the *formula* and the appointment of the *judex.*

These were the *editio actionis*, *in jus vocatio*, *vadimonium*, *postulatio.*

Other collateral topics were introduced into this portion of the Edict, and we shall endeavour in our notes to show as far as possible the reason for each insertion.

[2] "A plaintiff must first specify the action which he proposes to set on foot." He must at the outset particularize the *formula* for which he intends to make application, although he need not at this early stage of the proceedings state the grounds on which he will demand it. This specification is called the *editio actionis*, and must at any rate be sufficiently explicit to give the defendant a clue to what is intended, so that he can decide whether to yield or to contest the matter. In the Digest the topic of *Vocatio in jus* (summons) precedes that of *editio*, whence we conclude that in Justinian's time the plaintiff first called on his adversary to appear before the magistrate, and on his appearance declared to him the reason for which he had been cited; the ancient procedure of the days of Plautus being thus revived, such as is indicated in *Pers.* IV. 9. 8,

"D. Quid me in jus vocas?
S. Illi apud Praetorem dicam, sed ego in jus voco."

II. DE EDITIONE INSTRUMENTORUM ET RATIONUM[1].

Argentariae mensae exercitores rationem quae ad se pertinet edant, adjecto die et consule[2].

D. 2. 13. 4. pr. U. 4. (G. 1. P. 3.)

But in the time of Hadrian, according to the indicia which throughout we accept as conclusive, viz. the sequence of subjects in the four great Commentaries on the Edict, the order of procedure seems to have been to state the nature of the action first, and then, if no compromise could be effected, to proceed to the formal summons, or *vocatio in jus.*

"Edere est etiam copiam describendi facere, vel in libello complecti et dare vel dictare. Eum quoque edere Labeo ait qui producat adversarium suum ad album et demonstret quid dictaturus est vel id dicendo quo uti velit." Ulp. in D. 2. 13. 1. 1.

[1] The same desire of fair-play, which induced the Praetor to call on a plaintiff to propound his *editio actionis* before serving his opponent with a *vocatio in jus*, caused him to make compulsory other *editiones*, viz. (1) *editio instrumentorum*, the statement of the documents which would be produced at the hearing of a case; (2) *editio rationum*, the delivery of accounts by a banker whenever they were called for by any depositor or party interested. This last-named *ratio* is not of necessity connected with litigation, and probably the rules relating to it were only introduced into the Edict at this point, because *editio rationum* is an *editio* or declaration, however it may differ in its non-litigious character from the other two *editiones* named. This insertion of topics parenthetically, and by reason of a very slender clue of analogy, is characteristic of the Edict, and undoubtedly mars very greatly its simplicity and regularity; but the instances observable are not so numerous as to warrant Austin's strong assertion that "since the contents of the Code and Pandects were arranged according to the order of the Praetorian Edict, their arrangement has as little pretension to the name of *systematic*, as if it were merely alphabetical." Austin's *Jurisp.* Lect. XXXVI.

[2] *Quae ad se pertinet* = "in which the applicant for an account is concerned." It is to be noted, however, that he who asked for such an account had first to take the oath "de calumnia," that he was not applying for the mere purpose of annoyance. D. 2. 13. 9. 3.

Argentario eive qui iterum edi postulabit, causa cognita edi jubebo[1]. D. 2. 13. 6. 8. U. 4. (G. 1. P. 3.)

III. DE PACTIS.

Pacta conventa, quae neque dolo malo, neque adversus leges, plebiscita, senatusconsulta, edicta, decreta principum, neque quo fraus cui eorum fiat facta erunt, servabo[2].
D. 2. 14. 7. 7. U. 4. (G. 1. P. 3.)

Adjecto die et consule. This is obviously material in an account carrying interest; and there is the further reason given by Ulpian: "Rationes *cum die et consule* edi debent, quoniam accepta et data non alias possunt apparere, nisi dies et consul fuerit editus." D. 2. 13. 1. 2. On the other hand: "editiones (actionum) *sine die et consule* fieri debent, ne quid excogitetur e die et consule, et praelato die fiat." D. 2. 13. 1. 2.

[1] "To another banker, or to anyone who demands an account for the second time, I shall only order the same to be rendered on cause shown."

The reason of the edict for the production of accounts by a banker is that it is the banker's special business to keep them, and to be able to state at any moment how the balance stands between himself and his client. Still he is not to be troubled needlessly, and, in particular, another banker who deals with him has the same professional skill in book-keeping as he, and so must in general draw out his own balance-sheet.

[2] Between the *editio actionis* and the *in jus vocatio*, as also between the *in jus vocatio* and the appearance in court, there is an opportunity for compromise, *transactio.* "Qui in jus vocatus est duobus casibus dimittendus est, si quis ejus personam defendet, et si dum in jus venitur de ea re transactum fuerit." D. 2. 4. 22. 1.

Transactio is a species of compact, *pactum*; and thus on the same principle whereby the rules as to all varieties of *editio* were introduced upon the first mention of that special *editio* styled *editio actionis*, so where *pactum transactionis* has its proper place, Julian interpolated the whole Praetorian legislation on the subject of *pacta* generally. The excerpt above is the only one left to us; but both the nature of the subject, and the considerable length at which it is treated in D. 2. 14 and 2. 15, lead us to conclude that the Edict contained an extensive collection of rules thereupon. To enter into a discussion of *pacts*, their varieties, the

IV. DE TRANSACTIONIBUS.

D. 2. 15. (G. 1. P. 3. U. 4.)

V. DE IN JUS VOCANDO.

Si quis in jus vocatus non ierit, sive quis eum vocaverit quem ex edicto meo non debuerit, ex causa a competente judice mulcta pro jurisdictione judicis damnabitur[1].

D. 2. 5. rub.: 2. 5. 2. 2. (P. 1.)

Parentem, patronum, patronam, liberos parentes patroni patronae, in jus sine permissu meo ne quis vocet. *In eum qui adversus ea fecerit quinquaginta aureorum judicium dabo.*

D. 2. 4. 24. pr. U. 5. P. 4.

FORMULA.

Recuperatores sunto. Si paret illum patronum ab illo illius patroni liberto contra edictum illius praetoris in jus vocatum esse, recuperatores illum libertum illi patrono sestertium v. milia condemnate. Si non paret absolvite[2].

Gai. *Comm.* IV. 46.

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formalities which invested many of them with the higher legal character of *contracts*, the differences between *nuda pacta*, *pacta legitima*, *pacta adjecta*, *pacta praetoria*, &c. &c. would be out of place here; and we can only refer those who desire an elementary knowledge of these matters to the Appendices (M) in Abdy and Walker's *Gaius and Ulpian*, or (L) in their *Justinian's Institutes*; whilst those who wish thoroughly to master the subject must consult Pothier *On Obligations*, either in the original French or in Evans' translation.

[1] Some persons cannot under any circumstances be served with a *vocatio in jus*, as Consuls, Praefects, Praetors, or any magistrates invested with *imperium*: madmen, infants and those not *sui juris*. As to *imperium*, see *Justinian's Institutes* (A. and W.) App. (Q) p. 502. Others cannot be summoned except by special leave from the magistrate, and of these an account is given in the next excerpt.

[2] We have already stated in our Introduction that each clause of the Edict establishing a rule of law was followed by the appropriate *formula* for the enforcement of that rule: but these *formulae* were purposely omitted by Tribonian and his associates in the

In jus vocati *aut* veniant aut vindicem dent[1].

D. 2. 4. 24. U. 5. Gai. *Comm.* IV. 46.

In jus vocati aut eant, aut satis vel cautum dent[2].

D. 2. 6. rub. (P. 4.)

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compilation of the Digest, as inconsistent with the "extraordinary" procedure of their times. Gaius, however, living under the "formulary system," has preserved a few *formulae* in his Commentaries, and these we shall insert in their proper places, as undoubtedly forming a part of Julian's Edict.

[1] The precise character of a *vindex* in the days of Gaius has been a matter of great debate. Clearly in ancient times a *vindex* was very much more than an agent appointed for the mere convenience of the defendant to carry on a suit to which the latter could not conveniently attend. He was rather an agent of a peculiar kind who appeared on behalf of a defendant whom the laws forbade to maintain his own cause. Gai. *Comm.* IV. 21. This disability from personal appearance, however, seems only to have existed when the action was *per manus injectionem*, and of the kinds called *judicati* or *pro judicato*. Gai. *Comm.* IV. 22. Now the *legis actio per manus injectionem* was all but obsolete in the days of Gaius and Julianus (Gai. *Comm.* IV. 25); so that in the excerpt which we have here introduced, the words of Gaius have reference not to a *vindex* of the ancient kind, but to a mere *fidejussor* who guarantees the appearance of the defendant himself; and thus "vindicem dent" = "satis vel cautum dent" in the rubric of D. 2. 6.

[2] "Defendants served with a summons must either appear at once or furnish sureties or guarantee for their appearance."

In Justinian's time there were four varieties of security in support of the *vadimonium*, or engagement to appear; whereas in olden times there seems to have been but one, namely for *vades*, or guarantors, to enter into a promise, possibly supported by a *sponsio*, that the defendant should appear on the day assigned, which generally was the next day but one, *perendino die*. When the Roman territory became more extensive, a longer time was allowed, viz. one day for each twenty miles between the place of service and the court, exclusive of the day of summons and the day of appearance. D. 2. 11. 1. pr. The alternative securities in Justinian's time were:

Si quis parentem, patronum, patronam, liberos aut parentes patroni patronae, liberosve suos eumve quem in potestate habebit, vel uxorem vel nurum in judicium vocabit, qualiscunque fidejussor judicio sistendi causa accipiatur.

D. 2. 8. 2. 2. U. 5. (G. 1. P. 4.)

Ne quis eum qui in jus vocabitur vi eximat, neve faciat dolo malo quo magis eximatur. Si quid adversus ea factum fuerit, quanti ea res ab actore aestimata sit, tanti in factum judicium dabo.

D. 2. 7. rub.: 2. 7. 4. 1: 2. 7. 5. 1. P. 4. U. 5.

In bona ejus qui judicio sistendi causa vindicem dedit, si neque potestatem sui faciet, neque defendetur, iri jubebo[1].

D. 42. 4. 2. pr. U. 5.

VI. DE POSTULANDO[2].

(a) DE HIS QUI IN TOTUM NE POSTULENT.

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i. *Satisdatio*, or the furnishing of sureties:
ii. *Cautio pigneratitia*, or the deposit of a pledge:
iii. *Cautio juratoria*, an oath to appear, given by *viri illustres*: C. *de dign.* 17.
iv. *Cautio promissoria*, a simple promise, given by landowners, whose immovable property was in itself a security. D. 2. 8. 15. pr.

Probably the whole of these were available also in Julian's day; but we have reason for supposing that *satisdatio* was the usual mode of assurance. The sureties had in general to be men of substance, *locupletes*, D. 2. 8. 2, pr.: D. 2. 6. 1. pr.; hence the saving contained in the next excerpt.

[1] Tribonian replaces *vindicem* by *fidejussorem*. See note on preceding page.

"I shall order the plaintiff to take possession of the goods of a defendant who has given a surety for appearance in court, and neither presents himself nor is represented." This possession is merely *custodiae causa* and not *rei vendendae causa*. If appearance is not enforced by this distress, the surety will have to forfeit the amount for which he has bound himself.

[2] If no compromise (*transactio*) be effected between the *vocatio in jus* and the time appointed for appearance, the parties proceed to "postulate" or state their pleas.

Si non habebunt advocatum, ego dabo[1].

D. 3. 1. 1. 4. U. 6. (G. 1. P. 5.)

(β) DE HIS QUI PRO ALIIS NE POSTULENT[2].

(γ) DE HIS QUI NISI PRO SE ET PRO CERTIS PERSONIS NE POSTULENT[3].

Qui lege, plebiscito, senatusconsulto, edicto, decreto principum nisi pro certis personis postulare prohibentur, hi pro alio quam pro quo licebit in jure apud me ne postulent.

D. 3. 1. 1. 8. U. 6. (G. 1. P. 5.)

"Postulatio est desiderium suum vel amici sui apud eum qui jurisdictioni praeest exponere, vel alterius desiderio contradicere." D. 3. 1. 1. 2. Each party states *in jure* what he proposes to prove or disprove, but no evidence is taken; the hearing of evidence being reserved for the after-part of the proceedings before the *judex*, *in judicio*.

Ulpian supplies us with the following information: "hunc titulum (de postulando) Praetor proposuit habendae rationis causa, suaeque dignitatis tuendae, et decoris sui causa: ne sine delectu passim apud se postulent. Ea propter facit tres ordines. Nam quosdam in totum prohibuit postulare; quibusdam pro se permisit; quibusdam et pro certis dumtaxat personis et pro se permisit." D. 3. 1. 1. pr. and 1.

[1] "Initium facit Praetor ab his qui in totum prohibentur postulare. In quo edicto aut pueritiam aut casum excusavit. Pueritiam, dum minorem annis XVII prohibet postulare :...propter casum, surdum." D. 3. 1. 1. 3.

But he allows these persons to be represented by an advocate; and if needful will assign one to them himself, as this excerpt states.

[2] "Secundo loco edictum proponitur in eos qui pro aliis ne postulent prohibentur. In quo edicto excepit Praetor sexum et casum, item personas turpitudine notabiles. Sexum, dum feminis prohibet pro aliis postulare...casum, dum caecum utrisque luminibus orbatum Praetor repellit...Removet autem a postulando pro aliis et eum qui corpore suo muliebria passus est...et qui capitali crimine damnatus est...et qui operas suas, ut cum bestiis depugnaret, locavit." D. 3. 1. 1. 5: 3. 1. 1. 6.

[3] These were persons *infamia notati*. Hence in the following paragraph of the Edict we have a catalogue of *infames*, who until

VII. DE HIS QUI NOTANTUR INFAMIA.

Infamia notatur qui ab exercitu ignominiae causa ab imperatore, eove, cui de ea re statuendi potestas fuerit, dimissus erit. Qui artis ludicrae pronuntiandive causa in scaenam prodierit. Qui lenocinium fecerit. Qui in judicio publico calumniae praevaricationisve causa quid fecisse judicatus erit. Qui furti, vi bonorum raptorum, injuriarum, de dolo malo et fraude, suo nomine damnatus pactusve erit. Qui pro socio, tutelae, mandati, depositi, suo nomine non contrario judicio damnatus erit. Qui eam, quae in potestate ejus esset, genero mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere virum moris est, antequam virum elugeret in matrimonium collocaverit: eamve sciens quis uxorem duxerit, non jussu ejus in cujus potestate est. Et qui eum, quem in potestate haberet, eam, de qua supra comprehensum est, uxorem ducere passus fuerit. Quive suo nomine, non jussu ejus in cujus potestate esset, ejusve nomine quem quamve in potestate haberet, bina sponsalia, binasve nuptias in eodem tempore constitutas habuerit[1].

D. 3. 2. 1. pr. J. 1. U. 6. (G. 1. P. 5.)

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their infamy was removed by act of the Emperor or Magistrate could only plead for themselves and the other persons subsequently named.

[1] *Pronuntiandi causa* = in order to declaim.

Lenocinium fecerit = qui quaestuaria mancipia (*vel liberos suos*) *habet*, i. e. lets out his slaves or children for prostitution. Ulp. in D. 3. 2. 4. 2.

Judicium publicum = a criminal prosecution. Just. *Inst.* IV. 18.

Calumnia = malicious litigation. Gai. *Comm.* IV. 172—181.

Praevaricatio = the betrayal of a cause by an advocate who plays into the hands of the opposing party. D. 3. 2. 4. 4.

Suo nomine = for his own offence, not in a noxal action for that of his slave or descendant.

Pactus erit = has compromised the suit, bought off the prosecutor. Gai. *Comm.* IV. 182; D. 3. 2. 6. 3.

Contrario judicio: see D. 3. 1. 6. 7; "nam in contrariis non de perfidia agitur sed de calculo."

Qui ex his omnibus, qui supra scripti sunt, in integrum restitutus non erit pro alio ne postulet: praeterquam pro parente, patrono, patrona, liberis parentibusque patroni patronae, liberisve suis, fratre, sorore, uxore, socero, socru, genero, nuru, vitrico, noverca, privigno, privigna; pupillo, pupilla, furioso, furiosa, fatuo, fatua, cui eorum a parente, aut de majoris partis tutorum sententia, aut ab eo, cujus de ea re jurisdictio fuit, ea tutela curatiove data erit[1].

D.3.1.1.9: 3.1.1.11: 3.1. 2. pr.: 3.1. 3. pr. G.1. U.6. (P. 5.)

VIII. DE VADIMONIIS[2].

(G. 1. J. 2. P. 6. U. 7.)

The rules about premature second marriages are to be found also in *Fragm. Vat.* § 320, ed. Laboulaye; whence we perceive that a woman was forbidden to marry within a year from the death of her father or child, as well as within the same period after the decease of her husband.

[1] The words "cui eorum a parente, aut de majoris partis tutorum sententia, aut ab eo, cujus de ea re jurisdictio fuit, ea tutela curatiove data erit," will be readily understood after a perusal of Gai. *Comm.* I. 143 *et seqq.*, where the varieties of *tutela* are catalogued and explained. See also App. (D) to Abdy and Walker's edition of *Gaius and Ulpian.*

[2] We have already remarked (p. 34) that a portion of the rules as to *vadimonia* seems to have been inserted by Julian in the Prooemium of the Edict: another portion would come under the category which we have designated V. Partis Primae, and a third notice is appropriately inserted here: for when the *postulatio* was not completed in one day, *vadimonium* would have to be given for a fresh appearance at a second hearing *in jure.* The *vadimonia* were sometimes prolonged because of the intricacy of the case itself, sometimes because the Praetor decreed a holiday on occasion of public joy or mourning: see Juv. *Sat.* III. 213, "differt vadimonia praetor:" or because the magistrate before whom the first appearance took place found that the cause belonged to a higher cognizance. To such reappearance after an adjournment we may refer the passage in Gai. *Comm.* IV. 184: "Cum autem in jus vocatus fuerit adversarius, ni eo die finitum fuerit negotium, vadimonium ei faciendum est, id est ut promittat se certo die sisti."

Si quis eum de quo noxalis actio[1] est judicio sisti promisit, in eadem causa eum exhibere in qua tunc est, donec judicium accipiatur, jubebo. D. 2. 9. 1. pr. U. 7.

Adversus eum qui dolo fecit quominus quis in *vadimonium* vocatus sistat, quanti actoris interfuit eum sisti in factum *judicium dabo.* D. 2. 10. 3. pr. J. 2.

IX. DE COGNITORIBUS ET PROCURATORIBUS[2].

Alieno nomine, item per alios agendi potestatem non faciam in his causis in quibus ne dent cognitorem (*vel procuratorem*), neve dentur, edictum comprehendit[3].

Fragm. Vat. § 322, ed. Laboulaye. (G. 3. P. 8, 9. U. 8, 9.)

In justification of our references above to G. 1., P. 6, see D. 2. 8. 3 : 2. 8. 5 : 2. 8. 16.

Excerpts from J. 2 and U. 7 are quoted in our text itself.

[1] Gai. *Comm.* IV. 75-79.

[2] Gai. *Comm.* IV. 82-84, 97, 101, 124. No doubt in the Edict there were separate titles, one on *cognitores*, the other on *procuratores*, but the difference between the two classes of agents had become imperceptible at the time when the Digest was compiled, and the quotations from the Jurists are so intermixed by Tribonian, that it is useless endeavouring to separate them.

The subject of agents is naturally introduced here on account of the mention of the *vindex* in V. Partis Primae, of the *advocatus* in VI. Partis Primae : and in fact from the general scope of VI., which so largely deals with "pleading for others."

[3] "Quod ait 'alieno nomine item per alios' breviter repetit duo edicta : cognitorium unum, quod pertinet ad eos qui dantur, *vel qui dant : alterum* ut qui prohibentur vel dare vel dari cognitores, iidem et procuratores dare darive arceantur." *Fragm. Vat.* § 323, ed. Laboulaye.

We have not very much information as to the persons prohibited from becoming or appointing agents *ad litem;* but we may quote the following passages :

"Veterani procuratores fieri possunt. Milites autem, nec si velit adversarius, procuratores dari possunt, nisi hoc tempore litis constitutae quocumque casu praetermissum est ; excepto eo qui in rem suam procurator datus est. vel qui communem causam omnis

Procuratorem ad litem suscipiendum datum, pro quo consentiente dominus judicatum solvi exposuit, judicium accipere cogam[1]. D. 3. 3. 8. 3. U. 8.

Cujus nomine quis *praeter cognitorem* actionem sibi dari postulabit, is eum boni viri arbitratu defendat, et ei quocum *alterius nomine* aget id ratum habere eum ad quem ea res pertinet boni viri arbitratu satisdet[2].

D. 3. 3. 33. 3. U. 9.

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sui numeri persequitur et suscipit." D. 3. 3. 8. 2. *Hoc* = the taking objection.

"Gordianus A. Luciano militi. Ita demum...actionem intentare potes, si cum primum litem contestareris, non est opposita praescriptio militiae." C. 2. 13. 13.

"Quos prohibet praetor apud se postulare, omnimodo prohibet, etiamsi adversarius eos patiatur postulare." D. 3. 1. 7.

"Omnes infames, qui postulare prohibentur, cognitores fieri non possunt etiam volentibus adversariis." Paul. *Sent.* I. 2. I.

"Ob turpitudinem et famositatem prohibentur quidam cognituram suscipere." *Fragm. Vat.* § 324, ed. Laboulaye.

[1] "When an agent has been appointed to conduct a suit, and his principal has entered into the stipulation '*judicatum solvi*' on his behalf, with his consent; I shall compel him to carry on the suit to a hearing before the *judex*."

As to the stipulation '*judicatum solvi*,' see Gai. *Comm.* IV. 91: D. 46. 7. 6: and § VI. Partis Secundae in the present treatise.

[2] "If any person, not being a *cognitor*, shall make request that he may sue in another's name, he must maintain that other's suit in such wise as an honest man would approve, and must furnish sureties, such as an honest man would deem satisfactory, to him whom he sues in the other's name, that the party concerned will ratify his proceedings."

The italicized words in the above excerpt are the restitutions which Hollweg suggests, in order to recorrect the alterations introduced by Tribonian that he might bring the passage into conformity with the practice of Justinian's times.

The agents referred to are *procuratores*, *tutores*, *curatores*, *actores municipum*.

"Defendere est id facere quod dominus in litem faceret, et cavere idonee." D. 3. 3. 35. 3.

X. DE NEGOTIIS GESTIS[1].

Si quis negotia alterius, sive quis negotia quae cujusque cum is morietur fuerint gesserit, judicium eo nomine dabo[2].

D. 3. 5. 3. pr. U. 10. (J. 3. G. 3. P. 9.)

XI. DE CALUMNATIORIBUS[3].

In eum qui ut calumniae causa negotium faceret vel non faceret pecuniam accepisse dicetur, intra annum in quadruplum ejus pecuniae quam accepisse dicetur, post annum simpli, in factum *judicium dabo*[4].

D. 3. 6. 1. pr. U. 10. (G. 4. P. 10.)

XII. DE IN INTEGRUM RESTITUTIONIBUS[5].

(*a*) Quod metus causa gestum erit ratum non habebo[6].

D. 4. 2. 1. pr. U. 11. (G. 4. P. 11.)

"*Defendere* signifies to do what the principal in the suit would do, and to give adequate security for his ratification of the proceedings."

1 After the rules concerning duly-appointed agents, *cognitores*, *procuratores*, and *actores municipum*, the subject of self-appointed agents, *negotiorum gestores*, naturally follows. The only fragment of Praetorian legislation on this subject which has come down to us is given above.

2 "Haec verba 'sive quis negotia quae cujusque cum is morietur fuerint gesserit' significant illud tempus quo quis post mortem alterius negotium gessit. De quo fuit necessarium edicere, quoniam neque testatoris jam defuncti, neque heredis qui nondum adiit, negotia gessisse videtur." D. 3. 5. 3. 6.

3 After the *litis contestatio*, which concluded the *postulatio*, an action was fairly on foot. Hence we have now a title on those who commence an action from corrupt motives.

4 "I shall grant an action on the case" (see Abdy and Walker's *Gaius and Ulpian*, App. (Q), for the precise meaning of *actio in factum*) "for fourfold the bribe received, if the action be brought within the year; for the simple amount thereof, if it be brought subsequently; against any one who is charged with having received money to act or to forbear with the intent of causing annoyance."

5 *Restitutio in integrum* is the renewal by authority of the Praetor of a right, whether of property, possession, action or defence,

(*b*) Quae dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbitur, judicium dabo[1].

D. 4. 3. 1. pr. U. 11. (G. 4. P. 11.)

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which in strictness of law has been destroyed, but which in equity ought still to subsist. This topic is very properly treated of in the portion of the Edict relating to proceedings *in jure*, because *restitutio* was a matter entirely retained within the personal cognizance of the superior magistrate, and never remitted to a *judex*.

"Integri restitutio est redintegrandae rei vel causae actio. Integri restitutionem Praetor tribuit ex his causis; quae per metum, dolum, et status permutationem, et justum errorem, et absentiam necessariam, et infirmitatem aetatis gesta esse dicentur." Paul. *Sent.* 1. 7. 1.

[6] The older form of this edict was "quod vi metusve causa"; which is referred to by Cicero in the words: "quod per vim et metum abstulerant." Cic. *Epp. ad Q. Frat.* 1. 1. § 7.

But *vis* must involve *metus*, and therefore the word *vi* was omitted in the later form.

Metus is defined by the Jurists thus: "metum accipiendum, Labeo dicit, non quemlibet timorem, sed majoris mali:" Ulp. in D. 4. 2. 5: "metum non vani hominis, sed qui merito et in hominem constantissimum cadat:" Gaius in D. 4. 2. 6: "nec timorem infamiae, neque alicujus vexationis." Ulp. in D. 4. 2. 7.

"Actio quod metus causa est praetoria, personalis, in rem scripta, arbitraria, competens per justum metum laeso ejusque heredibus, contra metum inferentem omnemque rei amissae possessorem, ad rem illam cum omni causa restituendam, et si arbitrio judicis non restituatur in quadruplum." Westenberg.

As to *actio arbitraria* see Just. *Inst.* IV. 6. 31.

[1] This action was introduced by C. Aquillius, B.C. 66: "nondum enim C. Aquillius collega et familiaris meus protulerat de dolo malo formulas": Cic. *de Off.* 3. 14. "everticulum malitiarum omnium judicium de dolo malo, quod C. Aquillius, familiaris noster, protulit": Cic. *de Nat. Deor.* 3. 30.

"Ipse (Labeo) sic definit: dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam." Ulp. in D. 4. 3. 1. 2.

"Actio de dolo est praetoria, personalis, arbitraria, famosa, subsidiaria, competens dolo deceptis et laesis eorumque heredibus, adversus decipientes, ad omnem rem dolo amissam cum omni

(*c*) Quod cum minore quam viginti quinque annorum natu gestum esse dicetur, uti quaeque res erit animadvertam[1].

D. 4. 4. 1. 1. U. 11. (G. 4. P. 11.)

(*d*) Qui quaeve posteaquam quid cum his actum contractumve sit, capite minuti minutae esse dicentur, in eos easve, perinde quasi id factum non sit, judicium dabo[2].

D. 4. 5. 2. 1. U. 12. (G. 4. P. 11.)

(*e*) Si cujus quid de bonis *deminutum esse*, cum is metu, aut sine dolo malo reipublicae causa abesset, inve vinculis, servitute, hostiumve potestate esset; posteave cujus actionis eorum cui dies exiisse dicetur:

item si quis quid usu suum fecisset, aut quod non utendo amissum sit consecutus *esset*, actioneve qua solutus *esset* ob id quod dies ejus exierit cum absens non defenderetur, inve vinculis esset secumve agendi potestatem non faceret, aut cum

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causa restituendam, et nisi restituatur, ad id quanti ea res est." Westenberg.

Westenberg describes the action as *subsidiaria*, because of the words in the edict: "si de his rebus alia actio non erit." An *actio famosa* was never to be instituted, if another, not *famosa*, would procure a sufficient remedy.

[1] "I will deal with each matter according to its circumstances."

"Non semper autem ea quae cum minoribus geruntur rescindenda sunt, ne magno incommodo hujus aetatis homines afficiantur, nemine cum his contrahente, et quodammodo commercio eis interdicto. Itaque nisi aut manifesta circumscriptio sit, aut tam negligenter in ea causa versati sint, Praetor interponere se non debet." Paulus in D. 4. 4. 24. 1.

[2] On the subject of *capitis deminutio* see Gai. *Comm.* I. 159—163. The present edict only refers to *capitis deminutio minima:* D. 4. 5. 2. pr.; and upholds the contracts made previously to arrogation: Gai. *Comm.* III. 84, IV. 80. The edict was requisite, because *ipso jure* the *persona* of the *arrogatus* was merged in that of the *arrogans*, and the contracting party thus losing his civil existence, no one remained to sue or be sued. This fiction was never applied to criminal or delict actions, or to public or quasi-public duties, such as *tutela;* hence the edict makes no mention of such matters.

eum invitum in jus vocari non liceret, neque defenderetur, cumve magistratus de ea re appellatus es*se*t:

sive cui per magistratus factum sine dolo ipsius actio exempta esse dicetur:

earum rerum actionem intra annum quo primum de ea re experiundi potestas erit, *dabo.*

Item si qua alia mihi justa causa esse videbitur, in integrum restituam, quod ejus per leges, plebiscita, senatus consulta, edicta, decreta principum licebit[1].

D. 4. 6. 1. 1. U. 12. (G. 4. P. 12.)

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[1] "If anything has been subtracted from the property of a person who is absent through intimidation, or through being occupied in public business not sought for by him with fraudulent intent; or who is in prison, servitude or the power of the enemy; or if it be alleged that the time for bringing any action has elapsed subsequently (to the return) of such person:

"likewise, if any person has made a thing his own by usucapion, or acquired anything lost by non-user (of another); or become free from any action through the expiration of the time for bringing it whilst he was absent and unrepresented, or in prison, or not affording (his adversary) the opportunity of suing him; or whilst it was unlawful to summon him into court against his will, and he had no representative; or whilst he was a magistrate when a suit on such matter was brought against him:

"or if it be alleged that any man's right of action has been taken from him by the act of a magistrate without any fraud on his own part:

"on such grounds I shall grant an action within one year from the time when the complainant first has the power of proceeding.

"Likewise, if any other cause shall appear reasonable to me, I shall grant *restitutio in integrum*, so far as is allowed by the *leges*, *plebiscita*, *senatus consulta* and imperial edicts and decrees."

Sine dolo malo. Callistratus, in D. 4. 6. 4, says that this saving clause is directed against those who delay their return after their public business is concluded, or who apply for a public commission in order to prosecute simultaneously some affair of their own.

"*Posteave;* ita accipiendum est, ut si inchoata sit bonae fidei possessoris detentio ante absentiam, finita autem eo reverso, restitutionis auxilium locum habeat, non quandoque, sed ita demum

(*f*) Quod eo auctore qui tutor non fuit *gestum esse dicetur*, si id actor ignoraverit, dabo in integrum restitutionem[1].

D. 27. 6. 1. 1, and 27. 6. 1. 6. U. 12. (G. 4. P. 12.)

si intra modicum tempus quam rediit hoc contigit." Ulp. in D. 4. 6. 15. 3.

Dies ejus exierit. See Gai. *Comm.* IV. 110.

Non defenderetur. "Nam si fuit procurator, quum habueris quem convenias, non debet inquietari." Ulp. in D. 4. 6. 21. 2. It is to be noted that when an absentee has *lost* in his absence, he can claim *restitutio in integrum*, even though he appointed an agent to manage his affairs whilst he was away: but when he has *gained* in his absence, his adversary can only claim *restitutio in integrum* in case there was no *procurator* against whom proceedings could have been taken.

Invitum in jus vocari non liceret. This refers to Consuls, Praetors, and others invested with *imperium;* not to parents and patrons, who cannot be summoned without leave from the Praetor; for the proper course in their case would have been to make application. D. 4. 6. 26. 2.

"*Per magistratus factum;* ita accipiendum est, si jus non dixit: alioquin si causa cognita denegavit actionem, restitutio cessat. Item *per magistratus factum* videtur, si per gratiam aut sordes magistratus jus non dixerit." Ulp. in D. 4. 6. 26. 4.

Per leges...licebit. "Quae clausula non illud pollicetur, restituturum si leges permittant, sed si leges non prohibeant." Ulp. in D. 4. 6. 28. 2. The *leges*, in fact, make no provision at all for *restitutio in integrum*, which is a favour conferred by the Praetor "contra juris civilis rigorem." Some *leges*, however, expressly forbade *restitutio* in certain cases; and then the Praetor, as administrator and guardian of the laws, dared not to use his discretion, but referred the case to the Emperor. D. 4. 4. 10.

The action which the Praetor grants in the cases enumerated in the above edict is styled *Actio Publiciana Rescissoria*, having been introduced by the Praetor Publicius mentioned in Cic. *pro Cluent.* 45.

It is thus described by Westenberg: "actio praetoria, personalis, competens absenti cujus res usucapta est per praesentem, nec non praesenti cujus res usucapta est per absentem, ejusque heredi, contra eum qui usucepit, ejusque heredem, ad rem usucaptam, rescissa usucapione, cum omni causa restituendam."

[1] *Si id actor ignoraverit* = if the plaintiff thought him to be

In eum qui, cum tutor non esset, dolo malo auctor factus esse dicetur, judicium dabo; ut quanti ea res erit, in tantam pecuniam condemnetur[1].

D. 27. 6. 7. pr. U. 12. (G. 4. P. 12.)

(*g*) Quaeve alienatio judicii mutandi causa facta erit *dolo malo, in integrum restituam*[2].

D. 4. 7. 8. 1. P. 12. (G. 4. U. 12, 13.)

XIII. DE RECEPTIS.

Qui arbitrium, poena compromissa, receperit, *sententiam eum dicere cogam*[3].

D. 4. 8. 3. 2: 4. 8. 15. pr. U. 13. (G. 5. J. 4. P. 13.)

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tutor. "Scienti non subvenit Praetor: merito, quoniam ipse se decepit." Ulp. in D. 27. 6. 1. 6.

[1] *Quanti ea res erit* = id quod interest. "Magis puto non poenam, sed veritatem his verbis contineri." Ulp. in D. 27. 6. 7. 2.

[2] *Judicii mutandi causa* = in order to introduce a fresh plaintiff or defendant into a suit, with the intention of injuring his adversary. See the excerpts from Gaius in D. 4. 7. 1 and 4. 7. 3. The instances specially selected by the Jurist are: "si alterius provinciae hominem, aut potentiorem opposuerit adversarium:" and he gives the reason: "quia etiamsi cum eo qui alterius provinciae est experiar, in illius provincia experiri debeo; et potentiori pares non esse possumus."

So also the edict applies if our opponent manumit a slave to whom we lay claim.

[3] "When a man has undertaken the office of umpire, and the parties have agreed upon the penalty, I shall compel that man to make an award."

The Praetor encouraged the amicable settlement of disputes, and therefore allowed a reference to arbitration at any time before the *litis contestatio:* but it was necessary to the validity of the reference that the article in dispute should be deposited with the umpire; or, when that was impossible or inconvenient, the parties must enter into a stipulation and restipulation for a penalty to be paid by that one who should refuse to abide by the award or hinder the award being made. D. 4. 8. 11. 1 and 2. Hence "poena compromissa" in the excerpt. If the parties simply promised "sententiae sisti," still a penalty was presumed and could be recovered by a *condictio incerti.* D. 4. 8. 27. 7.

Nautae, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo[1].

D. 4. 9. 1. pr. U. 14. (G. 5. J. 4. P. 13.)

XIV. DE SATISDANDO[2].

(P. 14. U. 14.)

Rudorff prefers the reading "*pecunia* compromissa" instead of "*poena* compromissa," but the perpetual recurrence of the word *poena* in the title "De Receptis," D. 4. 8, renders it almost impossible that *pecunia* can have been corrupted into *poena* in the citation of the edict. Beck reads *poena*.

[1] Just as arbiters ought to complete the adjudication which they have undertaken (*receptum*), so also ought certain classes of traders to restore what they have taken into their charge (*receptum*). The mention of *receptum* in one sense leads to an introduction in immediate sequence of the rules as to *receptum* in the other sense. See remarks on this method of digressing in the notes on *editiones* and *pacta*, §§ II. III. Partis Primae.

[2] In many cases sureties had to be furnished at the time when the *formula* was issued: as for instance, by the defendant in a real action for the safe custody of the article in dispute; or by either party when he was acting *alieno nomine*, i.e. as an agent. No edict on this topic is extant, but references to the practice are abundant. See Gai. *Comm.* IV. 91, 101, 102: Paul. *Sent.* I. 11. 1: *Fragm. Vat.* §§ 92, 317, 336: U. 14 in D. 2. 8. 7. 1, and 5. 3. 5. pr.: P. 14 in D. 2. 8. 8. 5 and 6.

PARS SECUNDA.

DE JUDICIIS[1].

(i. A.)[2]

I. DE INOFFICIOSO TESTAMENTO[3].

Si quis testamentum inofficiosum *dicere velit, eo quod injuste*

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[1] The second part of the Edict deals with the proceedings "in judicio," or the hearing of the evidence before the *judex* appointed in the *formula;* who on the conclusion of this hearing pronounced sentence according to the instructions given to him in the *condemnatio.*

The evidence to be received would, of course, depend upon the nature of the action; and therefore in this portion of the Edict actions are classified and arranged, a short exposition of the facts necessary to found each being first set forth (which is the edict proper on the topic), and the appropriate *formula* subjoined. These *formulae* are in most cases lost, because Tribonian, in whose time another style of procedure was employed, had no reason for retaining them; but although the change of process from "ordinary" to "extraordinary" (see Abdy and Walker's *Justinian*, App. Q) caused the *formulae* themselves to be obsolete, yet the rules of law on which they had been founded still subsisted, and therefore are in some cases quoted verbatim in the Digest, and at other times are so clearly implied as to make a restoration of their text possible. To gather together what is thus preserved of the edicts, and to indicate the nature of the missing fragments, is our present task. The *formulae* we shall only attempt to reproduce in a few instances where Gaius or Cicero furnish us with materials.

[2] See Introduction, p. 24.

[3] The 5th book of the Digest opens with a title on *judicia* in

se exheredatum aut praeteritum esse queratur, neque ei quarta pars debitae portionis ab intestato relicta fuerit, de inofficioso *testamento* intra quinquennium judicium dabo.

D. 5. 2. 3: 5. 2. 5. 1: 5. 2. 8. 8 and 9 and 17: 5. 2. 9. U. 14.

II. DE HEREDITATIS PETITIONE[1].

D. 5. 3. (G. 6. J. 6. P. 16, 20. U. 14, 15.)

III. SI PARS HEREDITATIS PETATUR[2].

D. 5. 4. (G. 6. U. 15.)

IV. DE POSSESSORIA HEREDITATIS PETITIONE[3].

D. 5. 5. (G. 6. U. 15.)

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general and the proper *forum judicii*, i. e. venue or place of trial. We may therefore fairly conclude that the Edict also laid down rules on these subjects: but we abstain from purely hypothetical restitutions. Heineccius and Ranchinus have attempted the task, but their labours lead to utterly dissimilar results.

We have, however, adopted the restitution of the Edict "de inofficioso testamento" suggested by Pothier and approved by Westenberg; because it is so very strongly supported by the passages from the Digest cited just below it.

Of the five titles under (i. A), *judicia de dominio universitatis rerum*, the three first quoted refer to praetorian *formulae* for carrying into effect the Civil Law, *formulae in jus conceptae;* the fourth to the process for effectuating an edict of the Praetor Urbanus; the fifth to one for carrying out rules of the Praetor Fideicommissarius ; the two latter therefore being *formulae in factum conceptae*. See Abdy and Walker's *Gaius*, App. Q.

On the subject of Testamentum Inofficiosum see Abdy and Walker's *Justinian*, App. E.

1 *Vindicatio* = a real action for a single corporeal thing or for a predial servitude: *petitio* = a real action for a personal servitude or for an *universitas rerum*.

2 "Hereditas pro ea parte peti debet, pro qua ad nos pertinet: alioquin plus petendi periculum incurrimus et causam perdimus." Paul. *Sent.* in *Vet. Icti Consult.* v. 5. The *intentio* of the *formula* in this suit is quoted in Gai. *Comm.* IV. 54.

3 Just. *Inst.* III. 9.

V. DE FIDEICOMMISSARIA HEREDITATIS PETITIONE[1].

D. 5. 6. (P. 20. U. 16.)

(i. B.)[2]

VI. DE REI VINDICATIONE[3].

D. 6. 1. (G. 7. P. 21. U. 16.)

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[1] Gai. *Comm.* II. 247—259.

[2] See Introduction, p. 24.

[3] An *actio in rem*, Gaius tells us in *Comm.* IV. 91, can always be prosecuted in two different ways; it must therefore be understood that the *sponsio*, *formulae* and *stipulationes* which we have set down are equally applicable, *mutatis mutandis*, to any of the five preceding or four succeeding actions.

The genuine real action was that by "petitory formula," and the actual *formula* can be made out most clearly from the quotation of it by Cicero and Gaius. The *stipulatio judicatum solvi* was tacked on to enforce specific restitution, if that were possible: for in *formulae arbitrariae*, (of which kind were all the *formulae* in petitory suits,) the award was only optional in form; and it was really intended that the defendant should restore the thing, unless it had ceased to exist; and only pay the alternative assessment, if the restoration was impossible, not if he was simply unwilling to restore. Hence in cases of fraud or resistance, force, *militaris manus*, would be called in to enforce recovery of the thing itself.

The other form of prosecuting a real action was *per sponsionem*: which practically was a conversion of the *actio in rem* into an *actio in personam*. The plaintiff compelled his adversary to enter into a wager as to the ownership, and then sued him for the amount of his wager: but whether this had been lost or not could only be determined by the Court pronouncing its opinion on the question of ownership. The wager, therefore, being merely praejudicial, payment was never exacted (Gai. *Comm.* IV. 94); but at the time when the *formula* in claim of the wager was issued, the Praetor compelled the defendant to enter into a stipulation *pro praede litis et vindiciarum*, whereby he bound himself to permit the thing and its fruits to follow the judgment as to the wager.

Thus the sponsional procedure bore a strong resemblance to the English action of Ejectment, where the decision of a case of imaginary trespass committed by a supposed lessee of A upon a sup-

(a) *In Actione per formulam petitoriam.*

FORMULA PETITORIA.

Judex esto. Si paret eam rem, qua de agitur, ex jure Quiritium Auli Agerii esse, neque ea res Aulo Agerio restituetur, quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Cic. *in Verr.* II. 2. 12. Gai. *Comm.* IV. 51.

STIPULATIO JUDICATUM SOLVI.

Quod ego a te illam rem petiturus sum, si ea res ab illo judice, quive in locum ejus substitutus erit, secundum me heredemve meum judicata erit, judicatum solvi, aut quamdiu res sit rem

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posed lessee of B, settled which of the two, A or B, had the right to grant a lease, and by consequence which was the owner of the land in dispute.

The stipulations *judicatum solvi* and *pro praede litis vindiciarum* are restored in the form above on the authority of the following passages:

"Ideo in stipulatione adjicitur, *quive in ejus locum substitutus erit.*" Scaevola in D. 46. 7. 20.

"Quum lite mortua, nulla *res sit.*" Paulus in D. 46. 7. 2. See also D. 46. 7. 11.

"Illa verba, *arbitratu Lucii Titii fieri.*" D. 50. 16. 68. See also D. 3. 3. 33. 3: 3. 3. 45. pr. &c.

"Haec stipulatio, *quamdiu res non defendatur.*" Africanus in D. 46. 7. 15.

"Omnis qui defenditur *boni viri arbitratu defendendus est.*" D. 3. 3. 77.

"Judicatum solvi tres clausulas in unum collatas habet; *de re judicata, de re defendenda, de dolo malo.*" D. 46. 7. 6.

"Novissima clausula judicatum solvi stipulationis, *dolum malum abesse abfuturumque esse.*" Venuleius in D. 46. 7. 19. pr.

"Si autem adjectum sit, *si hujus rei dolus malus non aberit, quanti ea res est dare spondes?* Venuleius in D. 47. 7. 19. 1.

There is no mention of the stipulation *pro praede litis vindiciarum* in the Digest, because Tribonian merged it in the other stipulation, and thenceforward allowed only one form; but there is every reason to suppose it bore a strong resemblance to the *judicatum solvi* engagement; on which supposition its restitution has been attempted below.

boni viri arbitratu defendi, hujusque rei dolum malum abesse abfuturumque esse; si ita factum non erit, sive quid adversus ea factum erit, sive hujus rei dolus malus non aberit, quanti ea res est, tantam pecuniam dare spondes?—Spondeo[1].

(β) *In Actione per sponsionem.*

SPONSIO PRAEJUDICIALIS.

Si ea res, qua de agitur, ex jure Quiritium mea est, sestertios xxv nummos dare spondes.

Gai. *Comm.* IV. 93.

FORMULA SPONSIONALIS.

Judex esto. Si paret Numerium Negidium Aulo Agerio sestertios xxv nummos dare oportere, judex Numerium Negidium Aulo Agerio sestertios xxv nummos condemna. Si non paret absolve.

Gai. *Comm.* IV. 93.

STIPULATIO PRO PRAEDE LITIS VINDICIARUM.

Quod ego a te illam rem qua de agitur petiturus sum, si sestertii xxv nummi ab illo judice, quive in locum ejus substitutus erit, secundum me heredemve meum judicati erunt, quod ob illos sestertios xxv nummos te heredemque tuum pro praede litis vindiciarum dare facere oportet, id dari fierive, aut quamdiu res sit eam rem viri boni arbitratu defendi, et si huic rei dolus malus non aberit, afuerit, quanti ea res est, tantam pecuniam dari spondes?—Spondeo[2].

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[1] "Inasmuch as I am about to sue you for a certain thing; if that thing shall be assigned by A.B., the *judex*, or any deputy appointed in his stead, to me or my heir, do you engage that the award shall be performed, or that as long as the matter of suit is in existence it shall be defended in such wise as an honest man would approve; and that in the said matter all fraud is and shall be absent; and that if (the award) be not so carried out, or if anything be done contrary to our agreement (about the defence), or if fraud shall not be absent from the matter, you will pay me so much money as the case demands?"

[2] "Inasmuch as I am about to sue you for the thing in dispute; if 25 sesterces shall be awarded by A.B., the *judex*, or any deputy appointed in his stead, to me or my heir, do you engage that whatever you and your heir on account of the said 25 sesterces, in fulfil-

VII. DE PUBLICIANA IN REM ACTIONE[1].

Si quis id quod traditur ex justa causa non a domino et nondum usucaptum petet, judicium dabo.

D. 6. 2. 1. pr. U. 16. (G. 7. P. 19.)

FORMULA.

Judex esto. Si quem hominem Aulus Agerius emit et is ei traditus est, anno possedisset: tum si eum hominem de quo agitur ejus ex jure Quiritium esse oporteret, neque is homo Aulo Agerio restituetur, quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Gai. *Comm.* IV. 36.

VIII. SI AGER VECTIGALIS PETATUR[2].

D. 6. 3. (P. 21.)

IX. SI USUSFRUCTUS PETATUR, VEL AD ALIUM PERTINERE NEGETUR[3].

D. 7. 6. (J. 7. G. 7. P. 21. U. 17.)

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ment of your assurance of the thing in dispute and its fruits, ought to give or do, the same shall be given or done; or that so long as the said thing is in existence it shall be defended in such wise as an honest man would approve; and that if in this matter fraud be not or shall not be absent, you will pay me so much money as the case demands?"

[1] "I shall grant an action, if anyone sues for that which has been delivered to him by a non-owner in a legitimate transaction, and which he has not yet made his own by usucapion."

This action, like our action of Trover, is for the protection of the person entitled to the immediate possession; and available against all others except the owner, who could repel the Publician action by means of the *exceptio justi dominii*. D. 6. 2. 9. 4: 6. 2. 16: 6. 2. 17.

Formula. "Let X.Y. be *judex*. Taking for granted that A.A. had possessed for a year the slave whom he bought and who was delivered to him; if then that slave, with whom the present suit deals, ought to be his *ex jure Quiritium*, and yet is not restored to the said A.A., condemn N.N. &c."

[2] Gai. *Comm.* III. 145: Just. *Inst.* III. 24. 3.

[3] Just. *Inst.* II. 4 and 5.

X. SI SERVITUS VINDICETUR, VEL AD ALIUM PERTINERE NEGETUR[1].

D. 8. 5. (J. 7. G. 7. P. 21. U. 17.)

(i. C.)[2]

XI. DE DAMNO INJURIA DATO[3].

D. 9. 2. (G. 7. P. 22. U. 18.)

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[1] Just. *Inst.* II. 3; IV. 6. 2. The action in claim of a servitude, predial or personal, is called *actio in rem confessoria;* that to repel another's claim of such right is styled *actio in rem negatoria.*

[2] See Introduction, p. 24.

The actions under this head are differently arranged by the four great Jurists; and Ulpian further complicates the matter by interpolating the *judicia de partitione* in the very midst of the *judicia de damno*, treating of the former in his 19th and 20th books, and of the latter in books 18, 23. He appears also to have discussed the law of sureties (*fidejussores et sponsores*) in his 21st book, and that of *interrogationes in jure* in his 22nd. We have adhered to the arrangement of Julianus, so far as we can discover it; judging that the framer of the Edict would be the most likely to follow its order in his Commentaries; but Julianus unfortunately is quoted most sparsely of the four, and his books are so few in number, and consequently so many topics are comprised in each, that the clue is but a poor one. When the subject of Obligations (iii) is reached, the four Jurists begin again to work in parallel lines.

[3] Gai. *Comm.* III. 210—219. Just. *Inst.* IV. 3.

The action for the simple value within the year (or thirty days) was brought against one who admitted the fact of the damage, and only disputed the value of the article injured.

"Notandum est quod in hac actione quae adversus confitentem datur, judex non rei judicandae sed aestimandae datur; nam nullae partes sunt judicantis in confitentes." Ulp. in D. 9. 2. 25. 2.

A defendant who denied the commission of the damage was sued for double value. Paul. *Sent.* I. 19. 1: Just. *Inst.* IV. 6. 23: Gaius in D. 9. 2. 2. 1.

XII. DE NOXALIBUS JUDICIIS[1].

D. 9. 4. (G. 7. P. 22. U. 18, 23.)

XIII. SI QUADRUPES PAUPERIEM FECISSE DICETUR.

Si quadrupes pauperiem fecisse dicetur, aut noxae dedi aut aestimationem noxiae offerri jubebo[2].

D. 9. 1. 1. pr. Just. *Inst.* IV. 9. pr. U. 18. (G. 7. P. 22.)

XIV. DE HIS QUI EFFUDERINT VEL DEJECERINT.

Unde in eum locum quo vulgo iter fiet, vel in quo consistetur,

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[1] The placing of this title presents special difficulties. We have excerpts on the subject in D. 9. 4 from G. 6, 7 and 13, from J. 9 and 22, from P. 3, 6, 22, 39, from U. 3, 18, 23, 37. We conclude, however, that the quotations from G. 13, J. 22, P. 39, U. 37, are extracted from their Commentaries "*de furtis*," and it is natural that *noxae deditio* should be discussed there as well as here, since *furtum* and *damnum* were equally causes of noxal surrender. We also surmise that a slave might be given up for "corrupting the *album*," which explains the appearance of passages from P. 3, U. 3: and thus we are left with the citations G. 6 and 7; P. 6 and 22; U. 18 and 23 as our clue for fixing the position of *noxales actiones* in the Edict. Discarding P. 6, as having some reference to *vadimonia* provided by masters who had to defend the proceedings of their slaves, we notate as above, and can only suggest that Ulpian first discussed noxal surrender in connection with *damnum*, and then recurred to the topic under the title *de dejectis et effusis*.

[2] "If it be asserted that a quadruped has done mischief, I shall order it to be given up as a *noxa*, or that the value of the damage it has caused shall be tendered."

"Haec actio locum habet, quum commota feritate nocuit quadrupes, puta si equus calcitrosus calce percusserit...Quod si propter loci iniquitatem, aut propter culpam mulionis, aut si plus justo onerata quadrupes in aliquem onus everterit, haec actio cessabit damnique injuriae agetur." D. 9. 1. 1. 4. See also D. 19. 5. 14. 3.

The action *de pauperie*, therefore, is on account of damage done by an animal acting, as Justinian puts it, *contra naturam*. Just. *Inst.* IV. 9. pr.

dejectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum qui ibi habitaverit in duplum judicium dabo. Si eo ictu homo liber periisse dicetur, quinquaginta aureorum judicium dabo. Si vivet, nocitumque ei esse dicetur, quantum ob eam rem aequum judici videbitur eum cum quo agetur condemnari, tanti judicium dabo. Si servus insciente domino fecisse dicetur, in judicio adjiciam, aut noxam dedere[1].

D. 9. 3. 1. pr. U. 23. (G. 6. P. 19.)

Ne quis in suggrunda protectove supra eum locum quo vulgo iter fiet inve quo consistetur id positum habeat cujus casus nocere cui possit. Qui adversus ea fecerit, in eum solidorum decem in factum judicium dabo. Si servus insciente domino fecisse dicetur, *aut decem dari* aut noxae dedi jubebo[2].

D. 9. 3. 5. 6. U. 23. (G. 6. P. 19.)

XV. DE SERVO CORRUPTO.

Qui servum servam alienum alienam recepisse, persuasisseve quid ei dicetur dolo malo, quo eum eam deteriorem faceret, in eum quanti ea res erit in duplum judicium dabo.

D. 11. 3. 1. pr. U. 23. (G. 6. P. 19.)

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[1] "I shall grant an action for double the value of the damage caused or done against the occupant of premises from which anything is thrown or poured out into a place where there is a public thoroughfare or standing-place. If it be asserted that a free-born man has been killed by the fall of the article, I shall grant an action for 50 *aurei*. If he survive, and it be alleged that he has suffered hurt, I shall grant an action for such amount as the *judex* shall consider it fair for the defendant to pay. If there be a counter-allegation that the slave did it without his master's knowledge, I shall add to the *formula* (that he must pay the double damage) or deliver up the slave as a *noxa*."

[2] *Suggrunda* = a balcony. "Inter projectum et immissum hoc interesse ait Labeo, quod projectum esset id quod ita proveheretur, ut nusquam requiesceret, qualia moeniana et suggrundia essent &c." D. 50. 16. 242. 1.

Protectum = an overhanging upper story.

XVI. DE ALEATORIBUS.

Si quis eum apud quem alea lusum esse dicetur verberaverit damnumve ei dederit, sive quid eo tempore domo ejus subtractum erit, judicium non dabo.

In eum qui aleae ludendae causa vim intulerit, uti quaeque res erit animadvertam[1].

D. 11. 5. 1. pr. U. 23. (P. 19.)

XVII. SI MENSOR FALSUM MODUM DIXERIT[2].

D. 11. 6. (P. 25. U. 24.)

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[1] "If anyone beats or causes any damage to a person who is alleged to have allowed gambling in his house; or if anything has been stolen during the time of play from his house; I shall not grant an action."

"A man who uses force to compel people to gamble I shall punish in such wise as the circumstances require."

The first clause of this edict only denies a remedy to the keeper of the gambling-house, not to the fellow-gamblers. To discourage gambling the keepers of gaming establishments were put out of the protection of the law, with regard to their persons and damage to their property at all times; *ubicumque et quandocumque* says Ulpian in D. 11. 5. 1. 2; and with regard to thefts of their property during the time when play was going on. The edict does not extend to reasonable wagers on athletic contests, or deciding by lot, dice &c., who shall pay for a banquet and the like. Paulus in D. 9. 5. 2. 1: 9. 5. 4. pr.

The second clause of the edict has reference both to proprietors of gambling-houses and the gamblers themselves. The punishment might be fine, imprisonment, or even hard labour in the quarries. D. 9. 5. 1. 4: 9. 5. 2. pr.

[2] This title, "if a surveyor has falsely reported the measurement," forms an appropriate transition from the rules concerning damage to the rules concerning partition. And we conclude that the *judicium de finibus regundis* was mentioned in the Edict before the other two divisory actions. As to these, see Gai. *Comm.* IV. 42: Just. *Inst.* IV. 6. 20, IV. 17. 4.

(i. D.)[1]

XVIII. DE FINIBUS REGUNDIS.

D. 10. 1. (G. 7. J. 8. P. 23. U. 19.)

XIX. DE FAMILIA ERCISCUNDA.

D. 10. 2. (G. 7. J. 8. P. 23. U. 19.)

XX. DE COMMUNI DIVIDUNDO.

D. 10. 3. (G. 7. J. 8. P. 23. U. 19, 20.)

(i. E.)[2]

XXI. DE AD EXHIBENDUM JUDICIO[3].

D. 10. 4. (J. 9. P. 26. U. 24.)

FORMULA.

Quanti paret Auli Agerii interesse rem de qua agitur sibi exhiberi, si ea res penes Numerium Negidium est, dolove malo Numerii Negidii factum est quominus penes eum esset, neque arbitratu judicis res Aulo Agerio exhibeatur, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

D. 10. 5, *passim.* Gai. *Comm.* IV. 51.

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[1] See Introduction, p. 24.

[2] See Introduction, p. 24.

[3] This action can be brought not only by an owner, but by any person interested. D. 10. 4. 3. 9. It is, however, generally brought as a preliminary to an *actio in rem.* D. 10. 4. 3. 3. The object of the action is the production of the thing itself with all its fruits which have accrued during the defendant's possession ; and that possession is to be understood not only in the sense of civil possession, but also of mere detention. Just. *Inst.* IV. 17. 3 : D. 10. 4. 3. 15.

The action is *arbitraria*, so that the *judex* orders production of the thing *cum omni causa* or payment of the full amount in which the plaintiff is injured by its non-production. D. 10. 4. 9. 7 and 8. Our information as to the wording of the *formula* is so full, though not amounting to actual quotation, that we feel justified in inserting in the text a conjectural restoration of it.

XXII. DE INTERROGATIONIBUS IN JURE FACIENDIS[1].

D. 11. 1. (J. 9. G. 5. P. 17, 22. U. 22, 23.)

Qui in jure interrogatus responderit, adversus eum ex sua responsione judicium dabo.

D. 11. 1. 4. 1. U. 22.

Qui omnino non respondisse dicetur, in eum in solidum judicium dabo[2].

D. 11. 1. 11. 5. U. 22.

Si is in cujus potestate esse dicetur negaverit se in sua potestate servum habere; utrum actor volet, vel dejerare jubebo in potestate sua non esse neque se dolo malo fecisse quominus esset, vel judicium dabo sine noxae deditione[3].

D. 9. 4. 21. 2. U. 23.

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[1] The topic of *interrogationes in jure* (analogous to the "discoveries" prayed for in our Courts of Equity) we place in immediate sequence to the *judicium ad exhibendum;* despairing of ascertaining with perfect certainty its position in the Edict, by reason of the widely-differing numeration of the books of the Commentators in which a reference is made to it; but at the same time judging it probable that Julian would follow most consistently the arrangement of his own Edict. See D. 9. 4. 39. pr. Moreover the collocation is a natural one, for just as the *judicium ad exhibendum* is a preliminary to a *vindicatio*, so also is an *interrogatio in jure* preparatory to some other action, real or personal. The interrogation may be propounded either by the adverse litigant or by the Praetor, D. 11. 1. 9. 1; and its importance is obvious when we bear in mind the strictness of the rules respecting *plus petitio*. Gai. *Comm.* IV. 53—60: D. 11. 1. 1. pr.: 11. 1. 2. Interrogatories were only allowed before the *litis contestatio* in the action.

[2] "Qui tacuit apud Praetorem in ea causa est, ut instituta actione in solidum conveniatur, quasi negaverit...nam qui omnino non respondet contumax est, contumaciae autem poenam hanc ferre debet, ut in solidum conveniatur, quemadmodum si negasset, quia Praetorem contemnere videtur." Ulp. in D. 11. 1. 11. 4.

[3] "If the person alleged to have a slave in his power, shall deny that he has him, I shall at the option of the plaintiff either compel him to swear that he has him not in his power, or shall

XXIII. DE JUREJURANDO, SIVE VOLUNTARIO, SIVE NECESSARIO, SIVE JUDICIALI.

D. 12. 2.

Si is cum quo agitur, conditione delata juraverit, *aut cum jurare paratus esset jusjurandum ei remissum fuerit;* ejus rei de qua jusjurandum delatum fuerit neque in ipsum, neque in eum ad quem ea res pertinet, judicium dabo.

D. 12. 2. 3. pr.: 12. 2. 5. 4: 12. 2. 7. pr. U. 22.
(J. 9. G. 5. P. 18, 28. U. 26.)

Eum a quo jusjurandum petetur, *si eo exigente prior de calumnia juraverit adversarius*, solvere aut jurare *aut referre jusjurandum* cogam.

D. 12. 2. 34. 6 and 7. U. 26. (J. 9. G. 5. P. 18, 28. U. 22.)

Sacerdotem, Vestalem et Flaminem Dialem in omni jurisdictione mea jurare non cogam[1].

A. Gell. *Noct. Att.* x. 15. 31.

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grant an action in which there is no alternative of noxal surrender." On "noxal surrender" see § XII. above. This excerpt carries us on to the next topic in the Edict, *delatio jurisjurandi.*

[1] "If the defendant, when the tender is made to him by his opponent, takes the oath, or being prepared to take it is excused from swearing; I shall grant no action either against him, or against any person interested in the matter, in respect of that which was the subject of the tendered oath."

"When the oath (to the merits) is tendered to any man, and his opponent at his request first takes the oath *de calumnia*, I shall require him either to pay what is demanded, or to take the oath to the merits, or to tender back the oath."

"A Priest, a Vestal Virgin, or a Flamen Dialis I shall never compel to take the oath in my court."

The "tender of the oath" was allowable both in real and personal actions; in property questions and in suits on unilateral contracts: and to this reason we may attribute the fact that Paulus and Ulpian each discuss it in two several books of their commentaries. But as the circumstances of the tender were the same in all cases, it is best to draw together the notices on the subject.

The law of Rome allowed the oath to be tendered by one litigant to another in four cases:

1st, *judicio sistendi causa:* C. 12. 1. 17 (vide *not.* ad § v. Partis Primae, p. 41): 2nd, *calumniae causa:* "non calumniae causa agere:" "non calumniae causa infitias ire:" Gai. *Comm.* IV. 172, 174: 3rd, *de aestimatione rei litigiosae*, designated *in litem jus jurandum* in D. 12. 3: 4th, *litis decidendae gratia.* With the second and fourth varieties alone are we at present concerned.

Either party to the suit could make tender of the oath *litis decidendae gratia*, in court or out of court. His opponent thereupon could either accept the tender, and swear or profess readiness to swear; in which case his oath or his readiness to take the oath decided the case; or he could retender the oath, and so compel his opponent to take it or yield the matter in dispute.

It is to be observed, however, that any person before swearing *litis decidendae gratia* could insist that the challenger should himself first take the oath *de calumnia*, i.e. swear that he was not requiring the oath to the merits for annoyance sake. Thus we perceive that the oath to the merits might according to circumstances be voluntary or necessary, whilst the retendered oath *de calumnia* was in all cases necessary.

To make the matter more clear we will summarize the possible cases.

I. The defendant makes the tender;—he thereby gives the plaintiff an option (1) to decline the oath (for it is *voluntarium*) and leave everything in *statu quo*, the matter still depending on the evidence which can be adduced; (2) to accept the *jusjurandum voluntarium* to the merits, but before swearing to compel his adversary to take the oath *de calumnia*, which in this event becomes *jusjurandum necessarium;* and on both oaths being taken, the plaintiff can have an *actio in factum* for the matter originally in debate, which action he gains on the mere proof that he made the oath to the merits; (3) to retender the oath to the merits, which thus becomes *necessarium* on the part of the defendant, as also does the plaintiff's own oath *de calumnia;* and if the plaintiff now proceeds with the original suit, he will be met with the peremptory *exceptio jurisjurandi.*

II. If the oath be tendered by the plaintiff, the defendant in turn has his option; (1) to decline the oath, and leave the case to be decided by the evidence; (2) to accept the oath to the merits, thereby imposing on his opponent the *jusjurandum necessarium de calumnia*, and furnishing himself with the decisive *exceptio juris-*

(ii. F.)[1]

XXIV. DE RELIGIOSIS[2].

D. 11. 7 and 11. 8. (J. 10. G. 9. P. 27. U. 25.)

Si homo mortuus, ossave hominis mortui, in locum purum alterius, aut in id sepulchrum in quo jus non fuerit, illata esse dicentur, *in eum qui hoc fecit* in factum *judicium dabo*, et poenae pecuniariae subjicietur[3].

D. 11. 7. 2. 2. U. 25.

Si in locum publicis usibus destinatum intulerit quis mortuum, in eum judicium dabo.

D. 11. 7. 8. 2. U. 25.

Si locus religiosus pro puro venisse dicetur, ei ad quem ea res pertinet in eum in factum judicium dabo.

D. 11. 7. 8. 1. U. 25.

Ei qui prohibitus est inferre in eum locum, quo ei jus inferendi est, in factum judicium dabo.

D. 11. 7. 8. 5. U. 25.

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jurandi; (3) to retender the oath to the merits, which becomes at once *necessarium*, as does also his own oath *de calumnia.*

III. Thus much of the *jusjurandum voluntarium aut necessarium;* but there was also the *jusjurandum judiciale*, which in all cases of grave doubt the *judex* can tender to that party, whether plaintiff or defendant, on whose side there lies a slight presumption; and this oath if taken wins the case, if refused loses it. D. 12. 2. *passim.*

[1] See Introduction, p. 24.

[2] *Res extra patrimonium nostrum* comprehend *res sacrae*, *res religiosae* and *res sanctae;* but the first and last were placed in charge of the Aediles, and therefore the Praetorian Edict deals only with *res religiosae.*

[3] "Purus"=privatis usibus destinatus. "Purus locus dicitur qui neque sacer, neque sanctus est, neque religiosus, sed ab omnibus hujusmodi nominibus vacare videtur." D. 11. 7. 2. 4.

"In factum judicium." The object of the action was to compel the wrongdoer to remove the corpse or pay for the ground. D. 11. 7. 7. pr. "Tam heredi quam in heredem competit judicium, quod perpetuum est." Ibid.

Quod funeris causa sumtus factus erit, ejus recuperandi nomine in eum ad quem ea res pertinet judicium dabo[1].

D. 11. 7. 12. 2. U. 25.

XXV. DE SEPULCHRO VIOLATO.

Cujus dolo malo sepulchrum violatum esse dicetur, in eum in factum judicium dabo, ut ei ad quem pertineat quanti ob eam rem aequum videbitur condemnetur. Si nemo erit ad quem pertineat, sive agere nolet, quicumque agere volet, ei centum aureorum judicium dabo. Si plures agere volent, cujus justissima causa esse videbitur, ei agendi potestatem faciam.

Si quis in sepulchro dolo malo habitaverit, aedificiumve aliud quam quod sepulchri causa factum sit habuerit, in eum, si quis eo nomine agere volet, ducentorum aureorum judicium dabo.

D. 47. 12. 3. pr. U. 25.

(iii. G.)[2]

XXVI. DE REBUS CREDITIS ET DE CONDICTIONIBUS[3].

Si rerum creditarum *nomine* certum petetur, condictionem *dabo.*

D. 12. 1. 1. rub. (J. 10. P. 28. U. 26.)

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[1] "Hoc edictum justa ex causa propositum est, ut qui funeravit persequatur id quod impendit. Sic enim fiet ne insepulta corpora jaceant, neve quis de alieno funeretur." Ulp. in D. 11. 7. 12. 3.

[2] See Introduction, p. 24.

[3] *Creditum* or *res credita*, in its generic signification, denotes anything given or done in faith that another person will give or do something in return. D. 12. 1. 1. In a specific sense *creditum* = *mutuum*, i. e. the transfer of a sum of money, or other *res fungibiles*, to another person, in consideration of his promise that he will hereafter return an equal amount of the same description to ourselves.

In all cases of *creditum* the remedy was by *condictio*, and *condictiones* were invariably *stricti juris*.

The principal varieties of *condictio* allowed by the civil law were (1) *condictio certi*, i. e. *certae pecuniae*, *ex lege Silia*: D. 12. 1, Gai. *Comm.* IV. 19: (2) *condictio triticiaria*, *ex lege Calpurnia*, "de omni alia certa re:" D. 13. 3, Gai. *Comm.* IV. 19: (3) *condictio causa data causa non secuta*, to recover what had been given, in

Sponsio.

Si pecuniam certam creditam qua de agitur mihi debes, eam pecuniam cum tertia parte amplius dare spondes?—Spondeo.

Restipulatio.

Si pecuniam certam creditam qua de agitur non debitam a me petis, ejus pecuniae tertiam partem dare spondes?—Spondeo.

Gai. *Comm.* IV. 171, 180.

Formula.

Judex esto. Si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere, judex Numerium Negidium Aulo Agerio sestertium x milia condemna. Si non paret absolve.

Gai. *Comm.* IV. 41, 43.

XXVII. DE PECUNIA CONSTITUTA.

Qui pecuniam debitam constituit, si adpareat eum qui constituit neque solvisse neque fecisse, neque per actorem stetisse quominus fieret quod constitutum est, eamque pecuniam quum constituebatur debitam fuisse, *judicium dabo*[1].

D. 13. 5. 1. 1: 13. 5. 16. 2: 13. 5. 18. 1. U. 27. (J. 11. P. 29.)

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case of non-performance of the innominate real contract "do ut des," provided only the plaintiff had given some thing; if he had done a service he must proceed either *ex praescriptis verbis* or *de dolo*: D. 12. 4; see also D. 19. 5. 5. 1 and 2: (4) *condictio ob turpem vel injustam causam*, to recover what has been given for an illegal consideration: D. 12. 5: (5) *condictio indebiti*: and (6) *condictio sine causa*, to recover what has been given or promised without any consideration at all: D. 12. 6 and 12. 7: (7) *condictio furtiva*, to recover stolen property: D. 13. 1: (8) *condictio ex lege*, to recover anything due under the express provisions of a *lex*, e. g. to recover the *portio legitima hereditatis* due to children: D. 13. 2.

To these the Praetor added (9) *condictio utilis de eo quod certo loco dari oportet*: D. 13. 4: enabling the plaintiff to sue in any other place, if he tendered a fair allowance for the inconvenience occasioned by the change: D. 13. 4: and *condictio utilis de pecunia constituta*: D. 13. 5.

[1] "When it can be shown that anyone has made a fresh compact as to money due, and has not paid or done what he promised,

XXVIII. DE COMMODATI JUDICIO VEL CONTRA.

Quod quis commodasse dicetur, de eo judicium dabo[1].

D. 13. 6. 1. pr. U. 28. (G. 9. P. 29.)

XXIX. DE PIGNORATITIO JUDICIO VEL CONTRA[2].

D. 13. 7. (G. 9. J. 11. P. 29. U. 28.)

XXX. DE EXERCITORIO JUDICIO[3].

Si is qui navem exercuerit in aliena potestate erit, ejusque voluntate navem exercuerit, quod cum magistro ejus gestum

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the non-performance not being due to the plaintiff, and that the money was actually due when he made the compact, I shall grant an action."

"Pecunia" is here to be understood to mean any *res fungibilis;* for *constitutum* is a promise to pay any debt whatever, whether our own or another person's, already existing according to civil, or praetorian, or even natural law. The promise was valid, although not entered into with the formality requisite to constitute an original contract. Just. *Inst.* IV. 6. 8: D. 13. 5. 1. 7 and 8.

In this action there was a *sponsio*, and of course also a *restipulatio*, similar to those in the *judicium de pecunia certa credita*, save only that they were for the half, not for the third of the matter in dispute. Gai. *Comm.* IV. 171, 180.

[1] This action is civil, and at the same time supported by an *edictum monitorium.* Moreover, though civil, it is *bonae fidei.* D. 13. 6. 3. 2. Gai. *Comm.* IV. 62.

[2] This is another *bonae fidei* civil action, supported by an *edictum monitorium.* In the case of demands enforceable by *condictio* there could be no cross-suit, whereas in *commodatum* and *pignus* the *commodatarius* or *creditor* could bring an action against the *commodans* or *debitor* for repayment of necessary expenses, &c. Hence the *actiones commodati* and *pignoratitia* are described as "*directae et contrariae*," and the Titles of the Digest dealing with these topics have the Rubrics "Commodati et contra," "De pignoratitia actione et contra."

[3] See Gai. *Comm.* IV. 71. The actions named in §§ XXX.—XXXIII. are praetorian actions, supplementary to the civil actions *de rebus creditis.*

erit, in eum in cujus potestate is erit qui navem exercuerit *in solidum* judicium dabo.

D. 14. 1. 1. 19. U. 28. (G. 9. P. 29.)

XXXI. DE INSTITORIO JUDICIO[1].

D. 14. 3. (G. 9. J. 11. P. 30. U. 28.)

XXXII. DE TRIBUTORIO JUDICIO[2].

D. 14. 4. (G. 9. J. 11. P. 30. U. 29.)

XXXIII. QUOD CUM EO QUI IN ALIENA POTESTATE EST GESTUM ESSE DICETUR.

In eum qui emancipatus aut exheredatus erit, quive abstinuit se hereditate ejus cujus in potestate cum moriretur fuerit, ejus rei nomine quae cum eo contracta erit cum is in potestate esset, sive sua voluntate sive jussu ejus in cujus potestate erit contraxerit, sive in peculium ipsius sive in patrimonium ejus cujus in potestate fuerit ea res redacta fuerit, judicium causa cognita dabo in id quod facere potest.

D. 14. 5. 2. pr. U. 29. (G. 9. P. 30.)

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[1] See Gai. *Comm.* IV. 71.

[2] "Hujus edicti non minima utilitas est ut dominus qui alioquin in servi contractibus privilegium habet, quippe cum de peculio dumtaxat teneatur, cujus peculii aestimatio deducto eo quod domino debetur fit, tamen si scierit servum peculiari merce negotiari, velut extraneus creditor ex hoc edicto in tributum vocetur." Ulp. in D. 14. 4. 1. pr.

If the master does not know that the slave has engaged in trade, he is only liable to the creditors to the extent of the *peculium*, and that *peculium* is to be calculated according to what is in the slave's hands, after a deduction has been made for what he owes his master. But if the master has been cognizant of the trafficking, the *peculium* in the hands of the slave is regarded as assets to be divided between the master and the other creditors in proportion to the amount of their claims; the master being, so to speak, the trustee in bankruptcy, and liable to be called to account by the other creditors if he favours himself in the distribution of the estate. Gai. *Comm.* IV. 72.

Quod jussu ejus cujus in potestate esset negotium gestum fuerit, de eo in solidum judicium dabo.

D. 14. 5. 1. pr.: 15. 4. 1. pr. G. 9. U. 29. (P. 30.)

Quod cum eo qui in alterius potestate esset negotium gestum erit, *ejus rei in eum cujus in potestate esset, quod non jussu ejus contractum sit,* dumtaxat de eo quod in peculio est, quodve dolo malo patris dominive factum est quominus in peculio esset, quodve in rem patris dominive versum sit, et si quid praeterea dolo malo patris dominive captus fraudatusve actor est, judicium dabo[1].

D. 15. 1. 1. 2: 15. 1. 2: 15. 1. 21. pr.: 15. 3. 1. pr.: 15. 1. 5. pr.: 15. 1. 36. U. 29. (G. 9. J. 12. P. 30.)

Post mortem ejus qui in alterius potestate fuerit, posteave quam is emancipatus, manumissus, alienatusve fuerit, dumtaxat de peculio, et si quid dolo malo ejus, in cujus potestate est, factum erit quo minus peculii esset, in anno, quo primum de ea re experiundi potestas erit, judicium dabo[2].

D. 15. 2. 1. pr. U. 29. (P. 30.)

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[1] The italicized words above are a restitution of Rudorff's, based on D. 14. 5. 1. pr.

[2] The rules contained in these four excerpts may be thus tabulated:—

1st. When a contract is entered into with a son or slave *jussu patris ejus*, there is an action

(α) against the father or master or their heirs *in solidum*, whether the son or slave continues *in potestate*, or departs from *potestas* by death, disinheritance, abstention from the inheritance, emancipation, manumission, or alienation:

(β) against the son or slave himself *in id quod facere potest*, if he be liberated from *potestas*.

2nd. When a contract is entered into with such person *injussu patris;* there is an action

(γ) against the father or master *de peculio et in rem verso*, so long as the son remains *in potestate*, and for one year afterwards.

(δ) against the son or slave himself *in id quod facere potest*, if he depart from *potestas*.

XXXIV. DE SENATUSCONSULTO MACEDONIANO[1].

D. 14. 6. (G. 9. J. 12. P. 30. U. 29.)

XXXV. DE SENATUSCONSULTO VELLEIANO.

D. 16. 1. (G. 9. J. 12. P. 30. U. 29.)

(iii. H.)[2]

XXXVI. DE DEPOSITI JUDICIO VEL CONTRA.

Quod neque tumultus, neque incendii, neque ruinae, neque naufragii causa depositum sit, in simplum; earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem ejus, quod dolo malo ejus factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum judicium dabo.

D. 16. 3. 1. 1. U. 30. (G. 9. J. 13. P. 31.)

FORMULA IN JUS CONCEPTA.

Judex esto. Quod Aulus Agerius aput Numerium Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob

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[1] The SC. Macedonianum, which the Praetor supported by an *edictum monitorium*, refused an action to any person who had lent money to a *filiusfamilias*, and desired to sue him after his father's death. The SC. Velleianum granted an *exceptio* to women who were sued on their obligations of *fidejussio*, *mutui datio*, &c. Hence a notice of these enactments is an appropriate conclusion of the portion of the Edict which deals with *res creditae*.

[2] See Introduction, p. 24. The *bonae fidei* actions previously mentioned, viz. *commodati* and *pignoratitia*, were for the recovery of an article parted with in consequence of the mere sollicitation of the defendant and for his sole benefit. The *bonae fidei* actions now before us are of a totally different character, the sollicitation proceeding from the plaintiff, or being mutual; and the benefit also being either on the plaintiff's side alone or reciprocal. We have first two actions falling under the primary category; then three falling under the second. In every case there is an *actio contraria* as well as an *actio directa:* naturally, as the whole topic was regulated *ex bona fide.*

eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, ejus judex Numerium Negidium Aulo Agerio condemna, nisi restituat. Si non paret absolve.

Gai. *Comm.* IV. 47.

FORMULA IN FACTUM CONCEPTA.

Judex esto. Si paret Aulum Agerium aput Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve[1].

Gai. *Comm.* IV. 47.

XXXVII. DE MANDATI JUDICIO VEL CONTRA.

D. 17. 1. (G. 9. 10. J. 13. P. 32. U. 31.)

XXXVIII. DE PRO SOCIO JUDICIO.

D. 17. 2. (G. 10. J. 14. P. 32. U. 31.)

XXXIX. DE EX EMPTO ET VENDITO JUDICIIS.

D. 18. D. 19. 1. (G. 10. J. 15. P. 33. U. 32.)

XL. DE EX LOCATO ET CONDUCTO JUDICIIS.

D. 19. 2. (G. 10. J. 15. P. 34. U. 32.)

XLI. DE EX AESTIMATO JUDICIO[2].

D. 19. 3. (P. 34. U. 32.)

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[1] The civil action was for restitution: hence the *formula in jus concepta* is *arbitraria*, and the *judex* only awards compensation to provide for the case of restitution being impossible. The Praetor, however, provided another action tending to simple compensation, when the plaintiff had no wish to receive the article back; and so the *formula in factum concepta* is merely for damages.

[2] "Actio de aestimato proponitur tollendae dubitationis gratia: fuit enim ingens dubitatio, cum res aestimata vendenda datur, utrum ex vendito sit actio propter aestimationem, an ex locato, quasi rem vendendam locasse videar, an ex conducto, quasi operas conduxissem, an mandati. Melius itaque visum est, hanc actionem proponi, quotiens enim de nomine contractus alicujus

XLII. DE EX RERUM PERMUTATIONE JUDICIO.

D. 19. 4. (P. 34.)

XLIII. DE PRAESCRIPTIS VERBIS ET IN FACTUM ACTIONIBUS.

D. 19. 5. (G. 10. U. 32.)

(iii. I.)[1]

XLIV. DE JURE DOTIUM[2].

D. 23. 3. (G. 11. J. 16. P. 35. U. 33.)

XLV. DE PACTIS DOTALIBUS[3].

D. 23. 4. (G. 11. J. 17. P. 35. U. 34.)

XLVI. DE FUNDO DOTALI.

D. 23. 5. (G. 11. J. 16. P. 36.)

XLVII. DE DONATIONIBUS INTER VIRUM ET UXOREM[4].

D. 24. 1. (G. 11. J. 17. P. 36. U. 34.)

XLVIII. DE DIVORTIIS ET REPUDIIS.

D. 24. 2. (G. 11. P. 35. U. 34.)

XLIX. SOLUTO MATRIMONIO DOS QUEMADMODUM PETATUR[5].

D. 24. 3. (G. 11. J. 16. P. 36. U. 33.)

L. DE IMPENSIS IN RES DOTALES FACTIS[6].

D. 25. 1. (P. 36.)

LI. DE JUDICIO RERUM AMOTARUM[7].

D. 25. 2. (J. 19. P. 37. U. 33, 34.)

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ambigeretur, conveniret tamen aliquam actionem dari, dandam aestimatoriam praescriptis verbis actionem." Ulp. in D. 19. 3. 1.

[1] See Introduction, p. 24.

[2] See Ulp. *Regulae*, VI. Paul. *Sent.* II. 21. B.

[3] See Paul. *Sent.* II. 22. Mackeldeii *Syst. Jur. Rom.* § 530.

[4] See Ulp. *Reg.* VII. Mackeldeii *Syst. Jur. Rom.* § 531.

[5] See Ulp. *Reg.* VI. 6—13.

[6] See Ulp. *Reg.* VI. 14—17.

[7] "Rerum amotarum judicium singulare introductum est adver-

LII. DE AGNOSCENDIS ET ALENDIS LIBERIS VEL PARENTIBUS VEL PATRONIS VEL LIBERTIS[1].

D. 25. 3. (J. 19. U. 34.)

LIII. DE INSPICIENDO VENTRE, CUSTODIENDOQUE PARTU.

Si mulier mortuo marito praegnantem se esse dicet, his ad quos ea res pertinebit, procuratoribusve eorum, bis in mense denuntiandum curet, ut mittant si velint, quae ventrem inspicient. Mittantur autem mulieres liberae dumtaxat quinque: haeque simul omnes inspiciant: dum ne qua earum dum inspicit, invita muliere ventrem tangat. Mulier in domo honestissimae feminae pariat, quam ego constituam. Mulier ante dies triginta quam parituram se putat, denuntiet his ad quos ea res pertinet, procuratoribusve eorum, ut mittant si velint, qui ventrem custodiant. In qûo conclavi mulier paritura erit, ibi ne plures aditus sint quam unus. Si erunt, ex utraque parte tabulis praefigantur. Ante ostium ejus con-

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sus eam quae uxor fuit, quia non placuit cum ea furti agi posse." Paul. in D. 25. 2. 1. pr.

"Nam in honorem matrimonii turpis actio adversus uxorem negatur." Gaius in D. 25. 2. 2.

[1] The first article in this edict is closely connected with the edict which follows. The Praetor had introduced a *praejudicium de partu agnoscendo*, to compel a father, or the person exercising *potestas* over a father, to acknowledge and maintain children born after a divorce. Just. *Inst.* IV. 6. 13. The Praetor's regulations were approved by the Senate and embodied in the SC. Plancianum: whilst another SC. enacted in the reign of Hadrian compelled fathers "durante matrimonio" to rear their children, instead of exercising their ancient right of exposing them. There is, however, considerable reason for supposing that Hadrian's rule was not very strictly observed. See App. A. to Abdy and Walker's edition of *Justinian's Institutes.* This much, however, is clear, that a father who complied with the provisions of either of these SCta had the same rights of inspection and visitation which were given to the *heredes ab intestato* or *heredes scripti* when a widow asserted her pregnancy; and which are described so fully in the next paragraph of the Edict.

clavis liberi tres et tres liberae cum binis comitibus custodiant. Quotiescumque ea mulier in id conclave, aliudve quod, sive in balineum ibit, custodes si volent, id ante prospiciant, et eos qui introierint excutiant. Custodes, qui ante conclave positi erunt, si volunt, omnes qui conclave aut domum introierint excutiant. Mulier cum parturire incipiat, his ad quos ea res pertinet, procuratoribusve eorum, denuntiet, ut mittant quibus praesentibus pariat. Mittantur mulieres liberae dumtaxat quinque: ita ut praeter obstetrices duas, in eo conclavi ne plures mulieres liberae sint quam decem: ancillae, quam sex. Hae quae intus futurae erunt, excutiantur omnes in eo conclavi, ne qua praegnans sit. Tria lumina, ne minus, ibi sint: scilicet quia tenebrae ad subiiciendum aptiores sunt. Quod natum erit, his ad quos ea res pertinet, procuratoribusve eorum, si inspicere volent, ostendatur. Apud eum educatur, apud quem parens jusserit. Si autem nihil parens jusserit, aut is, apud quem voluerit educari, curam non recipiet, apud quem educetur, causa cognita, constituam. Is apud quem educabitur, quod natum erit, quoad trium mensium sit, bis in mense; ex eo tempore, quoad sex mensium sit, semel in mense; a sex mensibus, quoad anniculus fiat, alternis mensibus; ab anniculo, quoad fari possit, semel in sex mensibus, ubi volet ostendat. Si cui ventrem inspici custodirive, adesseve partui licitum non erit, factumve quid erit, quo minus ea ita fiant uti supra comprehensum est, ei quod natum erit possessionem causa cognita non dabo. Sive quod natum erit, ut supra cautum est, inspici non licuerit, quas utique actiones me daturum polliceor his quibus ex edicto meo bonorum possessio data sit, eas, si mihi justa causa videbitur esse, ei non dabo.

D. 25. 4. 1. 10. U. 34.

LIV. SI VENTRIS NOMINE MULIERE IN POSSESSIONEM MISSA, EADEM POSSESSIO DOLO MALO AD ALIUM TRANSLATA ESSE DICATUR[1].

D. 25. 5. (P. 37. U. 34.)

[1] "Hoc edicto rectissime Praetor prospexit, ne, dum in favorem

LV. SI MULIER VENTRIS NOMINE IN POSSESSIONEM CALUMNIAE CAUSA ESSE DICETUR[1].

D. 25. 6. (U. 34.)

LVI. DE TUTELIS ET CURATELIS[2].

D. 26 and 27. (J. 20, 21. G. 12. P. 38. U. 35, 36.)

LVII. DE SUSPECTIS TUTORIBUS ET CURATORIBUS.

D. 26. 10. (U. 35.)

LVIII. DE FURTIS[3].

D. 47. 2. (J. 22. G. 13. P. 39. U. 37.)

FORMULA DE FURTO NEC MANIFESTO.

Judex esto. Si paret ope consiliove Numerii Negidii Aulo Agerio furtum factum esse paterae aureae, quamobrem eum

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partus possessionem polliceatur, aliis praedae occasionem praebeat. Idcirco constituit actionem in mulierem quae in alium hanc possessionem dolo malo transtulit. Non solum mulierem Praetor coercet, verum eum quoque in cujus potestate ea fuit, scilicet si dolo ipsorum alius in possessionem fuerit admissus: actionemque in tantum pollicetur in eos quanti interfuerit ejus qui experitur. Necessario Praetor adjecit ut qui per dolum venit in possessionem cogatur decedere." D. 25. 5. 1. pr. and 1, 2.

When this action was brought and failed, the woman had a cross-action, *contrarium judicium*, for the fifth part of the damages claimed from her. Gai. *Comm.* IV. 177.

[1] "Sicuti liberorum eorum qui jam in rebus humanis sunt curam Praetor habuit, ita etiam eos qui nondum nati sunt, propter spem nascendi, non neglexit: nam et hac parte edicti eos tuitus est, dum ventrem mittit in possessionem vice contra tabulas bonorum possessionis." D. 37. 9. 1. pr.

"Per calumniam in possessione videtur, quae sciens prudensque se praegnantem non esse voluerit in possessionem venire." D. 25. 6. 1. 2.

[2] See Gai. *Comm.* I. 143—200: Just. *Inst.* I. 13—26.

[3] In the Digest the Title "de furtis" is placed in Book 47, in connection with chapters on the other delicts: but it is quite clear from the references in the four great Commentaries on the Edict

pro fure damnum decidere oportet, quanti eam rem paret esse, tantae pecuniae duplum judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Gai. *Comm.* IV. 37.

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that in the last-named document the subject of *furtum* followed immediately after that of *tutela*. The explanation no doubt is that Julian left the rules "de furtis" in the position which they had occupied since their first introduction into the *edictum tralatitium;* whereas Tribonian and his colleagues adopted a more logical arrangement, and gathered together into one book the rules concerning all the delicts except *damnum*, which they treated of in that collocation where they found it. See § XI. above. If it be asked why *furtum* was placed so anomalously in the old edicts, we can only suggest that cases of *furtum* were originally out of the cognizance of the Praetor, and went to the Centumviral court; and that when the Praetor began to issue edicts on this topic, he thought it convenient to place them next after the cognate topics of frauds committed by guardians, and of "guardians removed for suspicion of fraud or incompetency," partly because of the nature of the offence, partly because the proceedings were *per manus injectionem*. In confirmation of this idea we may observe that the process in *furtum*, spoken of by Gaius in *Comm.* III. 192, 193, is purely civil and in the nature of the *legis actio* just mentioned: whilst Gaius further tells us that the substitution of a fourfold penalty for the capital punishment of the XII. Tables was a praetorian innovation; whereby, no doubt, an alternative was offered in the first instance to merciful plaintiffs, which by the operation of usage became compulsory.

The penalties of *furtum nec manifestum*, *conceptum* and *oblatum* were of immemorial origin, but supported by *edicta monitoria:* Gai. *Comm.* III. 190, 191: but the process and penalty in *furtum prohibitum* were invented by the Praetor: Gai. *Comm.* III. 192.

Heffter gives a somewhat different explanation of the allocation of the edicts "de furtis:" see our Preface, p. 25: with which for reasons there given we cannot entirely agree.

The remedies in other cases of theft and quasi-theft (if we may be allowed the expression), viz. those numbered LIX. to LXIII. above, were apparently tacked on successively in the Edict to the *judicia de furtis*, as the occasion arose for their enactment.

LIX. DE TIGNO JUNCTO[1].

D. 47. 3. (U. 37.)

LX. SI IS QUI TESTAMENTO LIBER ESSE JUSSUS ERIT, POST MORTEM DOMINI ANTE ADITAM HEREDITATEM SURRIPUISSE AUT CORRUPISSE QUID DICETUR.

Si dolo malo ejus qui liber esse jussus erit, post mortem domini ante aditam hereditatem, in bonis quae ejus fuerunt qui eum liber esse jusserit factum esse dicetur, quominus ex his bonis ad heredem aliquid perveniret, in eum intra annum utilem dupli judicium dabo.

D. 47. 4. 1. pr. U. 38. (G. 13.)

LXI. DE FURTO ADVERSUS NAUTAS CAUPONES STABULARIOS.

In eos qui naves, cauponas, stabula exercent, si quid a quoquo eorum quos quasve ibi habebunt furtum factum esse dicetur; sive furtum ope consilio exercitoris factum sit, sive eorum cujus qui in ea nave, *caupona*, *stabulo* navigandi, *exercendi*, *habitandi* causa esset, *in duplum judicium dabo.*

D. 47. 5. 1. pr. and 1. U. 38.

LXII. SI FAMILIA FURTUM FECISSE DICETUR[2].

D. 47. 6. (J. 22. U. 38.)

Quod familia publicanorum furtum fecisse dicetur, item si damnum injuria fecerit, et hi, ad quos ea res pertinet, non exhibebuntur, in dominum sine noxae deditione *in duplum* judicium dabo.

D. 39. 4. 12. 1. U. 38.

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[1] Just. *Inst.* II. 1. 29.

[2] "Datur arbitrium hoc edicto, ut si quidem (dominus) velit dicere noxios servos, possit omnes dedere qui participaverunt furtum: enimvero si maluerit aestimationem offerre, tantum offerat quantum si unus liber furtum fecisset, et retineat familiam suam. Haec autem facultas domino tribuitur toties quoties ignorante eo furtum factum est." Ulp. in D. 47. 6. 1. pr. and 1.

LXIII. DE ARBORIBUS FURTIM CAESIS[1].

Si quis furtim arbores caedet, succidet, cinget, subsecabit, quanti domino interest eas non laedi *in duplum judicium dabo.*

D. 47. 7. 7. 2 and 4 : 47. 7. 8. pr. U. 38. (G. 13. P. 39.)

LXIV. (DE JURE PATRONATUS.)

D. 37. 14.

SI QUIS INGENUUS ESSE DICETUR[2].

D. 40. 14. (U. 38.)

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[1] The action is based on the civil law, but further enforced by an *edictum monitorium.* "Si furtim arbores caesae sint, et ex lege Aquilia et ex duodecim tabularum dandam actionem, Labeo ait. Sed Trebatius : ita utramque dandum, ut judex in posteriorem deducat id quod ex prima consecutus sit, ex reliquo condemnet eum." Paul. in D. 47. 7. 1.

[2] The settlement of disputes between patrons and freedmen as to the services exigible from the latter by the former was never, in Heffter's opinion, a matter of praetorian cognizance; but during the period between the passing of the Lex Aebutia and Leges Juliae appertained to the Court of the Decemviri; and after the changes introduced by the latter laws formed a part of the jurisdiction of the Centumviri. This view is strongly supported by the fact that in D. 37. 14 "De Jure Patronatus" there is no excerpt from any Commentary on the Edict, but all the passages cited come from other legal works, which by their titles evidently dealt with the pure, unmodified *jus civile*, such as we have reason to suppose was administered in the Court of the Centumviri.

Still, just as in England, although the Ecclesiastical Courts do not investigate whether a right exists, e. g. a right of tithe or a right of advowson, and still entertain questions as to the consequences of an admitted right; so also at Rome the Decemviral or Centumviral Court, though not inquiring into the existence of patronage, yet decided as to the results of its admitted existence. So that the Praetor first settled by the help of a *judex*, whether A was or was not the *libertus* of B, just as the Courts of Common Law here would decide whether a man had or had not the right to due and accustomed tithes: and after the Praetor's *praejudicium*

FORMULA PRAEJUDICIALIS.

Judex esto. Si paret Numerium Negidium Auli Agerii libertum esse.

Gai. *Comm.* IV. 44.

LXV. DE OPERIS LIBERTORUM[1].

D. 38. I. (G. 14. J. 22. P. 40. U. 38.)

(iv. K.)[2]

LXVI. DE BONORUM POSSESSIONE CONTRA TABULAS[3].

Liberi sui emancipative, si neque instituti sint neque exheredati virilis sexus nominatim feminini inter caeteros, iis contra

had been decided in the affirmative, the Decemviral or Centumviral Court, like our Ecclesiastical Court, investigated the consequence of a proved state of facts.

The Praetorian *praejudicium* might also be preliminary to a further proceeding before the Praetor; as we see from the following: "Quotiens de hoc contenditur an quis libertus sit, sive operae petantur, sive obsequium desideretur, sive etiam famosa actio intendatur, sive in jus vocetur qui se patronum dicit, sive alia causa interveniat, redditur praejudicium. Sed et quotiens quis libertinum quidem se confitetur, libertum autem Gaii Seii se negat, idem praejudicium datur. Redditur autem alterutro desiderante. Sed actoris partibus semper qui se patronum dicit fungitur: probareque libertum suum necesse habet, aut si non probet vincitur." Ulp. in D. 40. 14. 6.

This *praejudicium* was founded on the civil law, although the process was provided by the Praetor: Just. *Inst.* IV. 6. 13.

1 *Operae* were extra services imposed on the slave as a condition for manumitting him, over and above the legal *obsequia* which were the ordinary incidents of patronage. The Praetor interfered on behalf of the freedman when these were excessive. D. 38. I. I and 2.

2 See Introduction, p. 24.

3 *Bonorum possessio* was the grant of possession of the estate of the defunct to a person, whether heir *ex jure civili* or not, provided only he was entitled to the same in equity.

The recipient of the grant could sue or be sued "ficto se herede." Gai. *Comm.* IV. 34.

tabulas testamenti bonorum possessionem dabo, exceptis iis qui jure heredes institui non possunt.

Gai. *Comm.* II. 135.

D. 37. 4. 3. 10. (J. 23. P. 41. U. 39.)

FORMULAE.

Judex esto. Si Aulus Agerius Lucio Titio heres esset, tum si paret fundum de quo agitur ex jure Quiritium ejus esse oportere, neque is fundus Aulo Agerio restituetur, quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Gai. *Comm.* IV. 34: Cic. *in Verr.* II. 2. 12.

Judex esto. Si Aulus Agerius Lucio Titio heres esset, tum si paret Numerium Negidium Aulo Agerio sestertium x milia dare oportere, judex Numerium Negidium Aulo Agerio sestertium x milia condemna. Si non paret absolve.

Gai. *Comm.* IV. 34, 43.

LXVII. DE LEGATIS PRAESTANDIS, CONTRA TABULAS BONORUM POSSESSIONE PETITA[1].

D. 37. 5. (J. 23. P. 41. U. 40.)

LXVIII. DE COLLATIONE BONORUM (DOTISVE)[2].

D. 37. 6 and 37. 7. (J. 23. G. 14. P. 41. U. 40.)

Ut recte caveatur boni viri arbitratu, collationem fieri jubebo.

D. 37. 6. 1. 9: 37. 6. 5. 1. U. 40.

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[1] "Hic titulus aequitatem quandam habet naturalem, et ad aliquid novam, ut qui judicium patris rescindunt per contra tabulas bonorum possessionem, ex judicio ejus quibusdam personis legata et fideicommissa praestarent, hoc est liberis et parentibus, uxori nuruique dotis nomine legatum." Ulp. in D. 37. 5. 1. pr.

[2] "Quum Praetor ad bonorum possessionem contra tabulas emancipatos admittat, participesque faciat cum his qui sunt in potestate bonorum paternorum, consequens esse credidit ut sua quoque bona in medium conferant qui appetunt paterna." Ulp. in D. 37. 6. 1. pr.

"Emancipati liberi praeteriti, si velint se miscere paternae here-

LXIX. DE CONJUNGENDIS CUM EMANCIPATO LIBERIS EJUS.

Si quis ex his quibus bonorum possessionem polliceor in potestate parentis cum moritur non fuerit, ei liberisque quos in ejusdem familia habuit, si ad eos hereditas suo nomine pertinebit, neque notam exheredationis meruerunt, bonorum possessionem ejus partis dabo, quae ad eum pertineret si in potestate permansisset, ita ut ex ea parte dimidiam ipse, reliquam liberi ejus habeant, hisque dumtaxat bona sua conferat.

D. 37. 8. 1. pr. U. 40. (P. 41.)

LXX. DE VENTRE IN POSSESSIONEM MITTENDO.

D. 37. 9. (G. 14. P. 41. U. 41.)

Ventrem cum liberis in possessionem esse jubebo[1].

D. 40. 4. 13. 3. U. 5. *Disp.*

LXXI. CARBONIANUM EDICTUM.

Si cui controversia fiet an inter liberos sit, et impubes sit, causa cognita perinde ei possessionem dabo, ac si nulla de ea re controversia esset, et judicium in tempus pubertatis causa cognita differam. Eum qui controversiam facit, si pro pupillo satis ei non detur simul in possessionem eorum bonorum esse jubebo.

D. 37. 10. 1. pr. and 1. U. 41. (J. 24. P. 41.)

LXXII. DE BONORUM POSSESSIONE SECUNDUM TABULAS.

D. 37. 11. (J. 23. P. 41. U. 41, 42.)

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ditati, et cum his qui in potestate remanserint communis patris dividere hereditatem, antequam bonorum possessionem petant, de conferendo cavere cum satisdatione debebunt. Quod si satisdare non possunt, statim ex fide bonorum confusionem, excepto peculio castrensi, facere cogendi sunt." Paul. *Sent.* v. 9. 4.

"Quamquam ita demum ad collationem dotis Praetor cogit filiam, si petat bonorum possessionem: attamen et si non petat, conferre debebit, si modo se bonis paternis immisceat." Ulp. in D. 37. 7. 1. pr.

[1] *Venter.* See § LIII. above.

FORMULA.

Si de hereditate ambigetur, et tabulae testamenti obsignatae non minus multis signis quam e lege oportet ad me proferentur, secundum tabulas testamenti potissimum hereditatem dabo[1].

Cic. *in Verr.* II. I. 45. 2.

LXXIII. DE BONIS LIBERTORUM[2].

D. 38. 2—5. (J. 25—27. G. 15. P. 42, 43. U. 41—44.)

LXXIV. SI A PARENTE QUIS MANUMISSUS SIT.

In eo qui a patre, avo paterno, proavove paterni avi patre manumissus sit *idem jus servabo quod patrono datur in bonis liberti.*

D. 37. 12. I. I. U. 45. (G. 15.)

LXXV. DE BONORUM POSSESSIONE EX TESTAMENTO MILITIS[3].

D. 37. 13. (U. 45.)

LXXVI. DE BONORUM POSSESSIONE AB INTESTATO[4].

D. 38. 6—12. (J. 27: P. 43. U. 46, 47.)

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[1] The edict of Verres is obviously faulty, inasmuch as it promises absolutely the possession *secundum tabulas:* for it ought to have contained a clause saving the rights of those entitled *contra tabulas.* Rudorff takes the opposite view, saying (what is perfectly correct): "edictum illud quo liberi praeteriti praeferuntur institutis nondum in usu fuit;" but *praeteriti* could bring the *querela inofficiosi* in the Centumviral Court, and if a Praetor had promised absolutely the possession to the *scripti heredes*, he would have caused a conflict of jurisdictions.

As to the origin and character of the *querela inofficiosi*, see App. E, Part II., in Abdy and Walker's *Justinian.*

[2] As to the rules on the topic see Gai. *Comm.* III. 39—76.

[3] Gai. *Comm.* II. 109—111.

[4] The Praetor arranged the *heredes ab intestato* in eight classes, of which a full description will be found in Just. *Inst.* III. 9. 2—7. See App. K in Abdy and Walker's *Gaius;* App. K in Abdy and Walker's *Justinian.* We have not sufficient materials for restoring the clauses in which *bonorum possessio* was promised to each

Si tabulae testamenti nullae exstabunt, tum quem ei potissimum heredem esse oporteret si intestatus mortuus esset, ita secundum eum possessionem dabo.

D. 38. 6. rub.: 38. 7. 1. pr.: Cic. *in Verr.* II. 1. 44. J. 27.

LXXVII. QUIBUS NON COMPETIT BONORUM POSSESSIO[1].

D. 38. 13. (J. 28. U. 48.)

LXXVIII. UT EX LEGIBUS SENATUSVE CONSULTIS BONORUM POSSESSIO DETUR.

Uti me quaque lege senatusve consulto bonorum possessionem dare oportebit, ita dabo[2].

D. 38. 14. 1. pr. U. 49.

LXXIX. SUCCESSORIUM EDICTUM[3].

D. 38. 9. (U. 49.)

LXXX. DE TESTAMENTIS[4].

D. 28 and 29. (J. 29—31. G. 17. P. 45, 46. U. 50.)

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class in succession; and we do not believe that the rubrics UNDE LIBERI, UNDE LEGITIMI, &c. in the Digest are quotations from the Edict, cordially agreeing with Rudorff's statement "istud *unde* ab interpretibus venit."

[1] "Ubicumque lex, vel senatusconsultum, vel constitutio capere hereditatem prohibet, et bonorum possessio cessat." Ulp. in D. 37. 1. 12.

"Edicto praetoris bonorum possessio his denegatur qui rei capitalis damnati sunt neque in integrum restituti sunt." D. 37. 1. 13.

In the single excerpt from Julian given in D. 38. 13 we have the instance of a son or slave being refused *bonorum possessio*, because his father or master has fraudulently prevented the testator from altering his testament. To this example we may surely add that of a person who wrongfully prevents the alteration of a testament which has been made in his own favour.

[2] See note on Just. *Inst.* III. 9. 7 in Abdy and Walker's edition.

[3] The provisions of this edict are stated briefly in Just. *Inst.* III. 9. 8—10.

[4] Testaments in Cicero's time were matters of Centumviral cognizance (*de Orat.* I. 38); and when the Leges Juliae took away

LXXXI. DE LEGATIS[1].

D. 30—32. (J. 32—35. G. 18. P. 47. U. 51.)

LXXXII. DE FIDEICOMMISSIS[2].

D. 30—32. (J. 36—40. G. 18. P. 47. U. 51.)

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from the Centumviri the greater portion of the matters enumerated in Cicero's catalogue, they seem to have left unimpaired their functions as a Court of Probate. We may consider then that the Praetor in Julian's day did not pronounce on the validity of a testament, *qua* testament, although he granted *bonorum possessio* to those nominated as heirs in a document sealed with the seals of seven witnesses; whilst the question whether that document sufficed in point of formality to make a man *heres ex jure civili* was decided by the Centumviri. Hence in the Digest we find very few excerpts on testamentary matters taken from the Commentaries *ad Edictum*, but an abundance from the Commentaries *ad Sabinum:* and the few quotations from edictal commentaries which occur lead us to the conclusion that the Praetorian rules were not directed to the settlement of the question whether a testament was good or bad, but merely regulated certain incidents arising out of the fact that a testament, presumably good, existed: such matters as absolving the heir from an oath by which the testator endeavoured to bind him to do illegal or onerous acts; allowing a *tempus deliberandi;* regulating the behaviour of the heir during the *tempus deliberandi;* settling the circumstances under which testaments might be inspected and copied; or when heirs should be removed as *indigni;* forbidding an *heres scriptus*, who was also *heres ab intestato*, to defeat the claims of legatees by refusing to accept under the testament &c. See D. 28. 7: 28. 8: 29. 3: 29. 4: 29. 5.

[1] The Praetor had cognizance in legacy suits; for they arise out of a testament established, not out of a testament disputed. But few, if any, relics remain to show to us the wording of his edicts. Their substance, no doubt, is contained in Gai. *Comm.* II. 191—245; Just. *Inst.* II. 20—22.

[2] *Fideicommissa* appertained to the cognizance of a special Praetor Fideicommissarius, who judged *extra ordinem.*

LXXXIII. UT IN POSSESSIONEM LEGATORUM VEL FIDEICOMMISSORUM SERVANDORUM CAUSA ESSE LICEAT[1].

D. 36. 4. (J. 38. U. 52.)

(iv. L.)[2]

LXXXIV. DE OPERIS NOVI NUNCIATIONE[3].

D. 39. 1. (J. 41. P. 48. U. 52.)

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[1] When a legacy was left under condition or for future payment, the heir, of course, had the right to interim possession, provided only he furnished security to the legatee for the safe custody of the legacy. If he failed to furnish the same, the legatee was entitled to possession. "Non exigit Praetor ut per heredem stet quominus caveat, sed contentus fuit per legatarium vel fideicommissarium non stare quominus ei caveatur. Quare omnimodo poterit in possessionem ex hoc edicto mitti." D. 36. 4. 1. 1.

[2] See Introduction, p. 24.

[3] We now pass from the process to obtain or protect a *possessio universitatis*, and have three edicts concerning the method of protecting a *possessio rerum soli*. Danger to such possession may obviously be dreaded either on account of something which is about to be done, or on account of something done already. In the former case the possessor is allowed to serve his opponent with a *nuntiatio novi operis*, after first making oath that he is not acting with vexatious intent. In the latter case he can either apply for one of the interdicts, *Quod vi aut clam*, *Quod in loco sacro religiosove*, or *Quod in flumine publico ripave publica factum est*, (vide §§ XXIV.; IV. V. VI.; X. XI. Partis Quartae, infra,) or can adopt the remedy detailed in the next excerpt, LXXXV.

The *nuntiatio novi operis* is only allowed when grave damage is feared either to the soil or to the buildings upon the soil; the mere cutting down of trees or damage of crops would not serve to warrant it. The *nuntiatio* may be made either by the party apprehending mischief or by his agent: and should be *real* and *public*, i. e. by open act such as throwing a stone &c., when the *novum opus* is about to be done by the defendant on the plaintiff's ground, or *verbal* and *private* when he is likely to endanger the plaintiff's land by something done upon his own.

After the *nuntiatio* is served, the defendant must either furnish sureties for the reparation of the mischief which may possibly accrue, or must stay his work until the *nuntiatio* is appealed

LXXXV. DE DAMNO INFECTO.

D. 39. 2.

Damni infecti suo nomine promitti, alieno satisdari jubebo ei qui juraverit, non calumniae causa id se postulare, eumve cujus nomine aget postulaturum fuisse, in eam diem quam causa cognita statuero[1].

Si controversia erit, dominus sit necne qui cavebit, sub exceptione satisdari jubebo[2].

De eo opere quod in flumine publico ripave ejus fiet, in annos decem satisdari jubebo[3].

Eum cui ita non cavebitur, in possessionem ejus rei, cujus nomine ut caveatur postulabitur, ire, et cum justa causa esse videbitur, etiam possidere jubebo[4].

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against and made null. If he furnishes sureties he becomes entitled to the prohibitory interdict, quoted in § XXVII. Partis Quartae, infra, to prevent his opponent staying the progress of what he is doing: if, on the contrary, he proceeds without furnishing sureties, his adversary in his turn has a right to the restitutory interdict, given in § XXVI. Partis Quartae, to have the work removed or stopped, and this whether the defendant prove ultimately to be in the right or in the wrong. See D. 39. 1. *passim.*

[1] "I shall order an assurance to be made on account of anticipated damage to anyone who has made oath that he does not himself demand this for mere vexation, or that his principal would not act vexatiously in demanding it; this assurance being by promise when anyone assures on his own account, and guaranteed by sureties when he assures on behalf of another; and extending to such date as I shall appoint after investigating the circumstances."

[2] "If it be disputed whether the person assuring be owner or not, I shall order him to furnish sureties *sub exceptione.*" The order, that is to say, will be worded "si dominus non sit, satisdari jubeo." See Paul. in D. 39. 2. 22. 1. The defendant can claim a *prejudicium* to settle the question.

[3] "When the work from which damage is anticipated is done in a public stream or on its bank, I shall order that there be sureties to guarantee no harm happening for ten years."

[4] "Any person not assured as above I shall order *to take pos-*

In eum qui neque caverit, neque in possessione esse, neque possidere passus erit, judicium dabo: ut tantum praestet, quantum praestare eum oporteret, si de ea re ex decreto meo, ejusve cujus de ea re jurisdictio fuit quae mea est, cautum fuisset[1].

Ejus rei nomine, in cujus possessionem misero, si ab eo qui in possessione erit damni infecti nomine non satisdabitur, eum, cui non satisdabitur, simul in possessione esse jubebo[2].

D. 39. 2. 7. pr. U. 53. (P. 48.)

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session of the property in respect of which assurance is demanded, and when sufficient reason is shown I shall further order him *to possess it.*"

To understand this we must bear in mind: "aliud est possidere, longe aliud in possessione esse" D. 41. 2. 10. 1. In fact *esse in possessione* denotes the mere fact of detention, protected or not protected by interdicts; *possidere* signifies that the detention is protected by interdicts and moreover will ripen by usucapion into ownership: hence a tenant is *in possessione*, whereas his landlord "possesses." See Savigny *on Possession*, Bk. I. § 7. On the details of the process in *damnum infectum*, see note on Gai. *Comm.* IV. 31 in Abdy and Walker's edition.

[1] "When a defendant neither makes assurance, nor allows his opponent to be in possession or to possess, I shall grant an action against him, to compel him to pay the amount which he would have had to pay, if assurance had been made in respect of the matter in debate in accordance with my order, or the order of anyone invested with the same jurisdiction as myself." The concluding words have reference to the fact that the Praetor generally delegated to the municipal magistrates the imposition of the *cautio* and the granting of the *missio in possessionem.* D. 39. 2. 1: 39. 2. 4. 3.

[2] "If a person put into possession *damni infecti nomine* does not provide sureties (to another who anticipates damage from the same source) with reference to that property of which I have given him the possession, I shall order that other to whom sureties are not provided to enter into joint possession with him."

When several persons anticipate damage from the same act, they can claim to be put in possession simultaneously; but if one

Cui non cavebitur, eum in possessionem esse jubeo, dum ei qui aberit prius domum denuntiari jubebo[1].

D. 39. 2. 4. 5. U. 1.

LXXXVI. DE AQUA PLUVIA ARCENDA[2].

D. 39. 3. P. 49. U. 53.

(iv. M.)[3]

LXXXVII. DE LIBERALI CAUSA[4].

D. 40. 12. P. 50, 51. U. 54, 55.

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obtains prior possession, he must either furnish sureties, or admit the others to share his possession.

[1] *Ei qui aberit* = the absent owner of the ground on which the *novum opus* has taken place.

[2] "Si cui aqua pluvia damnum dabit, actione aquae pluviae arcendae avertetur aqua. Haec autem actio locum habet in damno nondum facto, opere tamen jam facto, hoc est de eo opere ex quo damnum timetur, totiesque locum habet quoties manufacto opere agro aqua nocitura est." Ulp. in D. 39. 3. pr. and 1.

[3] See Introduction, p. 24.

[4] Under this title are comprehended two (or three) distinct actions: firstly, the *praejudicium*, (of which we have attempted to restore the *formula*,) settling the question of interim possession or non-possession by the person claiming to be *dominus:* after the determination of which point followed the *adsertio libertatis*, if it had been determined "hominem in servitute fuisse;" or the *vindicatio*, if the *judex* had found "hominem in libertate fuisse." As the preliminary suit is obviously possessory, the topic is appropriately placed in this part of the Edict.

"Si quis ex servitute in libertatem proclamat, petitoris partes sustinet. Si vero ex libertate in servitutem petatur, is partes actoris sustinet, qui servum suum dicit. Igitur cum de hoc incertum est, ut possit iudicium ordinem accipere, hoc ante apud eum qui de libertate cogniturus est, disceptatur, utrum ex libertate in servitutem, aut contra agatur. Et si forte apparuerit eum, qui de libertate sua litigat, in libertate sine dolo malo fuisse: is qui se dominum dicit, actoris partes sustinebit, et necesse habebit servum suum probare. Quod si pronuntiatum fuerit eo tempore quo lis

FORMULA PRAEJUDICIALIS.

Judex esto. Si paret illum hominem quo de agitur in libertate sine dolo malo fuisse.

D. 40. 12. 10. pr. U. 55.

LXXXVIII. DE PUBLICANIS ET VECTIGALIBUS ET COMMISSIS[1].

Quod publicanus, seu quis publicani nomine vi ademerit, quodve familia publicanorum, si id restitutum non erit, in duplum, aut si post annum agetur in simplum judicium dabo.

Item si damnum injuria furtumve factum esse dicetur, judicium dabo.

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praeparabatur, in libertate eum non fuisse, aut dolo malo fuisse: ipse qui de sua libertate litigat, debet se liberum probare." Ulp. in D. 40. 12. 7. 5.

[1] Why is this topic inserted in the part of the Edict which treats of possession? It would seem because the *publicani* were accustomed to compel satisfaction of their demands by taking *possession* of the goods of a defaulter by way of pledge. Gaius implies that in his day they could enforce their legal demands, even though they had omitted to take the pledge: but his words are by no means conclusive of the fact that the actual taking was then forbidden or unusual. The rules as to *vectigalia* would be introduced parenthetically, as the *publicani* were the collectors, according to the usual method of Julian, or rather of those more ancient Praetors whose Edicts he recast: and the rules as to *commissa*, confiscations to the *fiscus* on account of non-declaration of imported or exported merchandise liable to *vectigal*, would naturally follow. Besides *commissa* were not always confiscated absolutely, but when the non-declaration was without *dolus malus* the goods were only detained, held *in possession* by the revenue officers, until double duty was paid. D. 39. 4. 16. 10.

Seu quis publicani nomine. This is Beck's reading and appears the simplest. Rudorff has *Sociusve ejus, publici nomine:* the Florentine Digest has *ejusve publicani nomine.* Pothier alters the very beginning of the excerpt, and suggests *Quod quis publicani nomine*, but the MSS. are against him.

Si hi ad quos; Rudorff, Beck, Westenberg: *si id ad quos;* Pothier. The former is clearly the genuine text. "If those inculpated are not produced for noxal surrender."

Si hi ad quos ea res pertinebit non exhibebuntur, in dominos sine noxae deditione judicium dabo.

D. 39. 4. 1. pr. U. 55. (G. 21.)

FORMULA.

Judex esto. Quanta pecunia paret Numerium Negidium, si ejus vectigalis nomine quo de agitur pignus ab Aulo Agerio captum esset, id pignus luere debere, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Gai. *Comm.* IV. 32.

LXXXIX. DE VI BONIS RAPTIS ET DE TURBA.

Si cui dolo malo hominibus coactis damni quid factum esse dicetur, sive cujus bona rapta esse dicentur, in eum qui id fecisse dicetur intra annum quo primum de ea re experiundi potestas fuerit in quadruplum, post annum in simplum judicium dabo[1].

Item si servus fecisse dicetur in dominum noxale judicium dabo.

D. 47. 8. 2. pr. U. 56. (G. 21. P. 54.)

FORMULA.

Judex esto. Quantae pecuniae paret dolo malo Numerii

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[1] "In hac actione non utique expectamus rem in bonis actoris esse, sed sive in bonis sit, sive non sit, si tamen ex bonis sit, locum haec actio habebit. Quare sive commodata res sit, sive locata, sive etiam pignerata proponatur, sive deposita apud me, sic ut intersit mea eam non auferri, sive bona fide a me possideatur, sive usumfructum in ea habeam, vel quod aliud jus, ut intersit mea non rapi, dicendum est competere mihi hanc actionem, ut non dominium accipiamus, sed illud solum, ut ex bonis meis, hoc est ex substantia mea, res ablata esse proponatur." Ulp. in D. 47. 8. 2. 22.

The concluding words of this passage show why the *judicium vi bonorum raptorum* occupies its place in the Edict, viz. that *rapina* is viewed as a wrong done to a man's possession or detention, rather than to his ownership.

The same reasoning may also be applied when the allocation of the *judicium de turba* has to be explained.

Negidii vi hominibus coactis armatisve damnum Aulo Agerio factum esse, tantae pecuniae quadruplum judex Aulum Agerium Numerio Negidio condemna. Si non paret absolve.

Cic. *pro Tull.* 31.

Cujus dolo malo in turba damnum quid factum esse dicetur, in eum in anno, quo primum de ea re experiundi potestas fuerit in duplum, post annum in simplum judicium dabo[1].

D. 47. 8. 4. pr. U. 56. (G. 21. P. 54.)

XC. DE INCENDIO, RUINA, NAUFRAGIO, RATE NAVE EXPUGNATA.

In eum qui ex incendio, ruina, naufragio, rate, nave expugnata quid rapuisse, recepisse dolo malo, damnive quid in his rebus dedisse dicetur, in quadruplum in anno quo primum de ea re experiundi potestas fuerit, post annum in simplum judicium dabo. Item in servum et in familiam judicium dabo.

D. 47. 9. 1. pr. U. 56. (G. 21. P. 54.)

XCI. DE INJURIIS ET FAMOSIS LIBELLIS[2].

(G. 22. J. 45. P. 55. U. 56, 57.)

[1] "Erit haec differentia inter hoc edictum et superius, quod ibi de eo damno Praetor loquitur, quod dolo malo hominibus coactis datum est, vel raptum etiam non coactis hominibus, at hic de eo damno quod dolo malo in turba datum est, etiam si non ipse turbam coegit, sed ad clamorem ejus vel dicta vel misericordiam turba contracta est, vel si alius contraxit, vel ipse ex turba fuit." Ulp. in D. 47. 8. 4 6.

[2] Just as *damnum* denotes a wrong done to us in respect of that in which we have or might have true property, *dominium*, viz. a tangible thing; so *injuria* denotes a wrong done to us in respect of those matters wherein we have an interest which cannot in strict law be esteemed property, viz. our persons and our reputations. The Praetor seems to have recognized in these a bonitarian property, *possessio* in its original signification, and to have protected it by interdicts; whereas the *jus civile*, not acknowledging the possibility of *dominium* thereof, allowed no *vindicatio* or *condictio*.

Qui aget injuriarum certum dicat quid injuriae factum sit, et taxationem ponat non majorem quam quanti vadimonium fuerit.

D. 47. 10. 7. pr. : Paulus in *Lege Dei.* 2. 6. 1 : Gai. *Comm.* III. 224. U. 57.

FORMULA.

Judex esto. Quod dolo malo Numerii Negidii Aulo Agerio pugno mala percussa est, quanti paret ob eam rem Numerium Negidium Aulo Agerio condemnari oportere, dumtaxat sestertium x milia, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Paulus in *Lege Dei.* 2. 6. 4.

Qui adversus bonos mores convicium cui fecisse, cujusve opera factum esse dicetur quo adversus bonos mores convicium fieret, in eum judicium dabo[1].

D. 47. 10. 15. 1. U. 57.

For the *talio* of the XII. Tables was clearly neither the one nor the other of these, and the other penalties mentioned in Gai. *Comm.* III. 223 were imposed rather to avenge the public wrong than to compensate the private suffering. When the provisions of the XII. Tables fell into desuetude, *injuriae* of a grave description were prosecuted criminally under the Lex Cornelia, whilst the Praetor in all cases, great or small, allowed a *judicium aestimatorium*, in which the plaintiff assessed his own damages or had them assessed for him by the Praetor, and the *judex* could award any sum not exceeding the estimate.

In recognizing a *possessio* of person and reputation the Praetor acted as he had before done in the case of the *ager vectigalis;* wherein in fact he first brought into existence that equitable property denoted by the term *possessio*. See Savigny *On Poss.* Pt. 1, ch. 13.

When the *actio injuriarum* was brought and failed, a cross-action was allowed, *contrarium injuriarum judicium*, for the tenth part of the damages laid in the original suit. Gai. *Comm.* IV. 177.

[1] "Convicium dicitur vel a concitatione, vel a conventu, hoc est a collatione vocum; cum enim in unum complures voces confe-

Ne quid infamandi causa fiat. Si quis adversus ea fecerit prout quaeque res erit animadvertam.

D. 47. 10. 15. 25. U. 57.

FORMULA.

Judex esto. Quod Numerius Negidius sillum[1] immisit Aulo Agerio infamandi causa, quanti paret ob eam rem Numerium Negidium Aulo Agerio condemnari oportere, dumtaxat sestertium x milia, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

Paulus in *Lege Dei.* 2. 6. 5.

Qui servum alienum adversus bonos mores verberavisse, deve eo injussu domini quaestionem habuisse dicetur, in eum judicium dabo.

Item si quid aliud factum esse dicetur, causa cognita judicium dabo.

D. 47. 10. 15. 34. U. 57.

Si ei qui in alterius potestate erit, injuria facta esse dicetur, et neque is cujus in potestate est praesens erit, neque procurator quisquam existet, qui eo nomine agat, causa cognita ipsi qui injuriam accepisse dicetur judicium dabo.

D. 47. 10. 17. 10. U. 57.

runtur convicium appellatur, quasi convocium." D. 47. 10. 15. 4. Hence *convicium* means either abusive language addressed to a man publicly, or the act of inciting a crowd to beset a man's house or to mob the man himself.

[1] *Sillum.* "Τίμων amarulentus librum maledicentissimum conscripsit qui σίλλος inscribitur." A. Gell. *Noct. Att.* III. 17.

Possibly we have the same word in Cic. *ad Att.* 16. 1, for where Olivetus and Orelli read "sine vallo Luciliano," it has been suggested that "sine sillo Luciliano" is the proper text.

PARS TERTIA.

DE REBUS JUDICATIS, ET DE CONFESSIS ET INDEFENSIS.

I. DE RE JUDICATA ET DE EFFECTU SENTENTIARUM ET DE INTERLOCUTIONIBUS.

Si quis ab eo cujus de ea re jurisdictio est condemnatus sit ut pecuniam solvat, in eum, nisi solvat intra diem constitutum, *in duplum judicati actionem dabo*[1].

D. 42. 1. 4. 3: 42. 1. 5: 42. 1. 7. U. 58. (J. 45.)

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[1] We have no precise information as to the time allowed in Julian's day to the defendant for payment, before the *actio judicati* was granted against him. Gaius in *Comm.* III. 79 speaks of a different matter, viz. the time during which goods taken in accordance with a judge's order were held over before proceeding to a sale. See § IV. below. We know, however, that the period of grace allowed between judgment and action upon the judgment was fixed at two months in the code of Theodosius (4. 19), and lengthened by Justinian to four months. C. 7. 54.

The *actio judicati* was only *in duplum* when the defendant denied his liability; in other cases it was *in simplum*. Gai. *Comm.* IV. 171; Paul. *Sent.* I. 19. 1; Cic. *pro Flacc.* 21.

If the judgment in the *actio judicati* went against the defendant, his moveables were first distrained, and sold after an interval of thirty days; then followed distraint and sale of his lands; lastly, distraint and sale of his *jura incorporalia*. D. 42. 1. 15. 2 *et seqq.*

If he had no goods, or his goods were insufficient, he was committed to prison until he or his friends made satisfaction to the plaintiff; but the latter had to allow his friends to provide him with food and clothing, *victum et stratum*. D. 42. 1. 34.

II. DE CONFESSIS[1].

D. 42. 2. P. 56. U. 58.

III. DE CESSIONE BONORUM[2].

D. 42. 3. (P. 56. U. 58, 59.)

IV. QUIBUS EX CAUSIS IN POSSESSIONEM EATUR[3].

(G. 23. P. 57, 58. U. 59, 60, 61.)

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[1] "Confessus pro judicato est, quia quodammodo sua sententia damnatur." Paul. in D. 42. 2. 1.

The admission of the debt must be made in court and the presence of the creditor or his agent. D. 42. 2. 6. 3.

[2] *Cessio bonorum* was a voluntary assignment of his goods by a debtor for the benefit of his creditors. He must be "sine dolo obaeratus." The goods were sold, but the assignor was exempt from the disgrace of bankruptcy, and could not be imprisoned. If he acquired further property afterwards, this also was liable to seizure and sale, but subject to the *beneficium competentiae.* D. 42. 3. 4. 1 : 42. 3. 6 : 42. 3. 7.

[3] When a defendant or debtor absconded, and his case was left undefended, the Praetor granted to the plaintiff or creditor possession of his goods. It is obvious therefore that the topic of *possessio bonorum* in the case of a defendant is placed pertinently at this point of the Edict ; and the Praetor, since the process was the same in all other *possessiones,* discusses the whole at once. Some of the varieties are described in the two classical passages below.

"Bona autem veneunt aut vivorum aut mortuorum. Vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur ; item eorum qui ex lege Julia bonis cedunt ; item judicatorum post tempus, quod eis partim lege XII. tabularum, partim edicto Praetoris ad expediendam pecuniam tribuitur. Mortuorum bona veneunt velut eorum, quibus certum est neque heredes neque bonorum possessores neque ullum alium justum successorem existere." Gai. *Comm.* III. 78.

"Recita edictum: qui fraudationis causa latitat ; cui heres non exstabit ; qui exilii causa solum verterit ; qui absens judicio defensus non fuerit." Cic. *pro Quinct.* 19.

(α) IN POSSESSIONEM BONORUM VIVORUM.

Qui fraudationis causa latitaverit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo.

D. 42. 4. 7. 1. Cic. *pro Quinct.* 19. U. 59.

Qui absens judicio defensus non fuerit, *si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo.*

Cic. *pro Quinct.* 19.

Et ejus, cujus bona possessa sunt a creditoribus, veneant, praeterquam pupilli et ejus qui reipublicae causa sine dolo malo abfuerit.

D. 42. 4. 6. 1. P. 57.

Si is pupillus in suam tutelam venerit, eave pupilla viripotens fuerit, et recte defendetur, eos qui bona possident de possessione decedere jubebo.

D. 42. 4. 5. 2. U. 59.

(β) IN POSSESSIONEM BONORUM MORTUORUM.

Si cui heres non exstabit *ejus bona possideri vendique jubebo.*

Cic. *pro Quinct.* 19.

Si tempus ad deliberandum petet, dabo[1].

D. 28. 8. 1. 1. U. 60.

Si pupilli pupillae nomine postulabitur tempus ad deliber-

Other *possessiones* were acknowledged by the law; and the whole may be classified thus: (1) *judicio sistendi causa* (vide § V. Partis Primae), (2) *rei vel debiti servandi gratia:* (3) *legatorum vel fideicommissorum servandorum gratia:* (4) *ventris nomine.* The first-named was merely *custodiae causa:* the second was *custodiae causa* for a while, but if no appearance was made or no *defensor* appeared within a reasonable time, it became *vendendi causa:* the third and fourth were purely *custodiae causa.* As to the fourth vide §§ LIII. LXX. Partis Secundae. The third was granted when the payment of a legacy was future or contingent, and the heir was unable to give security for its discharge. "Non exigit Praetor ut per heredem stet quominus caveat, sed contentus fuit per legatarium vel fideicommissarium non stare quominus ei caveatur. Quare si non fuerit qui interpelletur cautionis nomine, hoc est is a quo legatum fideive commissum relictum est, omnimodo poterit in possessionem ex hoc edicto mitti." D. 36. 4. 1. 1.

[1] Gai. *Comm.* II. 167.

andum an expediat eum hereditatem retinere, et hoc datum erit, si justa causa esse videbitur bona interea deminui, nisi causa cognita boni viri arbitratu, vetabo[1].

D. 28. 8. 7. pr. U. 60.

Sui et necessarii si abstinere se velint ab hereditate, ut potius parentis bona veneant, *copiam iis faciam.*

Gai. *Comm.* II. 158.

Si per eum eamve factum erit, quo quid ex ea hereditate amoveretur, *abstinendi beneficium non dabo.*

D. 29. 2. 71. 3. U. 61.

(γ) IN POSSESSIONEM BONORUM CAPITE DEMINUTORUM[2].

Qui exilii causa solum verterit, *si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo.*

Cic. *pro Quinct.* 19.

V. DE REBUS AUCTORITATE JUDICIS POSSIDENDIS SEU VENDENDIS[3].

D. 42. 5. (G. 23, 24. P. 59, 60. U. 60-64.)

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[1] "Si non expedierit pupillo hereditatem parentis retinere, Praetor bona defuncti venire permittit, ut quod superaverit pupillo restituatur." Paul. in D. 42. 5. 6. pr.

[2] See Gai. *Comm.* III. 84; IV. 80, on the subject of *capitis deminutio minima.* The excerpt above deals with *capitis deminutio media.* As to *capitis deminutio maxima* we have the following rule of Paulus: "si libertate adempta capitis deminutio subsecuta sit, nulli restitutioni adversus servum locus est; quia nec praetoria jurisdictione ita servus obligatur, ut cum eo actio sit. Sed utilis actio adversus dominum danda est, ut Julianus scribit, et nisi in solidum defendatur, permittendum mihi est in bona quae habuit mitti." D. 4. 5. 7. 2.

[3] For 30 days in the case of goods belonging to a living man, and for 15 days in the case of those which had belonged to a dead man, the creditors were in possession merely *custodiae gratia:* Gai. *Comm.* III. 79. Hence rules were necessary to prevent their misuse of the possession accorded to them.

Besides the edicts which we are able to recover, we have the following indications of the course of praetorian legislation on this head:

Qui ex edicto meo in possessionem venerint, eos ita videtur in possessionem esse oportere. Quod ibidem recte custodire poterunt, id ibidem custodiant. Quod non poterunt, id auferre et abducere licebit. Dominum invitum detrudere non placet.

Cic. *pro Quinct.* 27.

Si quis cum in possessione bonorum esset, quod eo nomine fructus ceperit, ei ad quem ea res pertinet non restituet, sive quod impensae sine dolo malo fecerit, ei non praestabitur, sive dolo malo ejus deterior causa possessionis facta esse dicetur, de ea re judicium in factum dabo.

D. 42. 5. 9. pr. U. 62.

Quod postea contractum erit quam is cujus bona venierint consilium fraudandi receperit, sciente eo qui contraxerit, judicium eo nomine non dabo.

D. 42. 5. 25. U. 64.

VI. DE SEPARATIONIBUS[1].

D. 42. 6. (J. 46. U. 64.)

"Qui creditorem rei servandae causa, vel quia damni infecti non caveatur, mittit in possessionem, vel ventris nomine, non possessionem, sed custodiam rerum et observationem concedit." Paul. in D. 41. 2. 3. 23.

"Si quis fructus ex praedio debitoris capi poterit, hunc creditor qui in possessionem praedii missus est vendere vel locare debet." Ulp. in D. 42. 5. 8. 1.

"In eum qui neque locavit fructum praedii neque vendidit in factum actionem dat Praetor, et in hoc condemnabitur quanti minus propter hoc perceptum est quia neque vendidit neque locavit." Ulp. in D. 42. 5. 9. 6.

[1] This topic is introduced here because of its analogy with the *beneficia deliberandi* and *abstinendi* just mentioned in § IV. The nature of the *beneficium separationis*, so far as it is advantageous to the heir, is explained in Gai. *Comm.* II. 155.

It was also beneficial to the creditors when the heir was insolvent; for in that case it enabled the creditors of the defunct to be paid as far as the assets would go, without being prejudiced by the *concursus* of the creditors of the heir.

VII. DE CURATORE BONIS DANDO[1].

D. 42. 7. (J. 47. P. 57. U. 65.)

VIII. QUAE IN FRAUDEM CREDITORUM FACTA SUNT, UT RESTITUANTUR.

Quae fraudationis causa gesta erunt cum eo qui fraudem non ignoraverit, de his curatori bonorum, vel ei cui de ea re actionem dare oportebit, intra annum quo experiundi potestas fuerit, actionem dabo: idque etiam adversus ipsum, qui fraudem fecit, servabo[2].

D. 42. 8. 1. pr. U. 66. (G. 24. P. 62.)

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[1] The *curator bonorum* was a person selected by the creditors to take care of the property, and prevent waste. D. 42. 5. 15. pr.

He is called *magister* in Gai. *Comm.* III. 79.

[2] The action here mentioned is the *Actio Pauliana.* See Just. *Inst.* IV. 6. 6.

A *bonorum emptor* who purchased the estate from the creditors or their *curator* could elect between the *actio Serviana* and the *actio Rutiliana*, which are described in Gai. *Comm.* IV. 35.

PARS QUARTA.

DE AUCTORITATIBUS PRAETORIS[1].

(A) DE INTERDICTIS.

D. 43. (J. 48, 49. G. 25, 26. P. 63-68. U. 67-73.)

(A. *a*.)

I. QUORUM BONORUM[2].

Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides,

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[1] See Introduction, p. 28.

[2] The interdict *Quorum Bonorum* is described as *restitutorium, adipiscendae possessionis;* and is directed against anyone who detains *pro herede vel pro possessore* any item of an inheritance against him who has received from the Praetor the grant of *bonorum possessio.*

The phrase *pro herede vel pro possessore* is explained in Just. *Inst.* IV. 15. 3.

To this interdict we subjoin in the text above the *sponsio, restipulatio, formulae praejudiciales, stipulatio de re restituenda* and *formula secutoria*, the employment of which is explained in Gai. *Comm.* IV. 165, 169. Similar forms were used in all other cases where a *simple* interdict was employed, and therefore we shall in general omit them, as the above will serve for examples. The *sponsio*, as stated in the text, is quoted from Cicero; the *restipulatio* is restored conjecturally, but we have every reason to suppose it was the mere converse of the *sponsio;* the *formulae praejudiciales* and *stipulatio de re restituenda* are analogous to those in a *rei vindicatio*, and are therefore restored conjecturally in imitation of those for which our authority is given in § VI. Partis Secundae.

There was another mode of contesting the validity of a simple interdict, viz. *per arbitri postulationem.* This is mentioned in

possideresve si nihil usucaptum esset, quod quidem dolo malo fecisti uti desineres possidere, id illi restituas.

D. 43. 2. 1. pr. U. 67.

SPONSIO.

Si bonorum Turpiliae possessionem ille Praetor ex edicto suo mihi dedit, *neque restituisti*, sestertios tot nummos mihi dare spondes?—Spondeo.

Cic. *ad Fam.* 7. 21: Gai. *Comm.* IV. 165.

RESTIPULATIO.

Ni bonorum Turpiliae possessionem ille Praetor ex edicto suo tibi dedit, *neque restitui*, sestertios tot nummos mihi dare spondes?—Spondeo.

STIPULATIO DE RE RESTITUENDA.

Quod ego a te illam rem petiturus sum, si sestertii tot nummi ab illo judice, quive in locum ejus substitutus erit, secundum me heredemve meum judicati erunt, quod ob illos sestertios tot nummos te heredemque tuum restituere oportebit, id restitui spondes?—Spondeo.

FORMULA PRAEJUDICIALIS DIRECTA.

Judex esto. Si paret Numerium Negidium Aulo Agerio ex sponsione illa sestertios tot nummos dare oportere, judex Numerium Negidium Aulo Agerio sestertios tot nummos condemna. Si non paret absolve.

FORMULA PRAEJUDICIALIS CONTRARIA.

Judex esto. Si paret Aulum Agerium Numerio Negidio ex restipulatione illa sestertios tot nummos dare oportere, judex Aulum Agerium Numerio Negidio sestertios tot nummos condemna. Si non paret absolve.

FORMULA SECUTORIA.

Judex esto. Si paret Aulum Agerium in illa sponsione sestertiorum tot nummorum vicisse, neque a Numerio Negidio ex arbitratu illius rem Aulo Agerio restitui, quanti ea res

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Gai. *Comm.* IV. 163, but we have scarcely sufficient materials for the restoration of the forms.

The procedure in *double* interdicts was more complicated, and we shall recur to that subject in § XIX. below.

est, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolve.

II. DE POSSESSORIO INTERDICTO[1].

Gai. *Comm.* IV. 145.

III. DE SECTORIO INTERDICTO[2].

Gai. *Comm.* IV. 146.

IV. QUOD LEGATORUM[3].

Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis legatorum nomine non ex voluntate ejus ad quem ea res pertinet *possideo,* aut dolo malo desiisti possidere, si satisdatum sit, aut si per bonorum possessorem non stet ut satisdetur, *id illi restituas.*

D. 43. 3. 1. 2 : 43. 3. 1. 7 : 43. 3. 1. 11 : 43. 3. 1. 16 : 43. 3. 2. 1. Venuleius in *Fragm. Vat.* 90. P. 63. U. 67.

V. DE TABULIS EXHIBENDIS[4].

Quas tabulas Lucius Titius ad causam testamenti sui pertinentes reliquisse dicetur, si hae penes te sunt, aut dolo malo tuo factum est ut desinerent esse, ita eas illi exhibeas.

Item si libellus aliudve quid relictum esse dicetur, decreto comprehendam.

D. 43. 5. 1. pr. U. 68. (P. 64.)

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[1] "Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, cujus principium est QUORUM BONORUM...... Bonorum quoque emptori similiter proponitur interdictum, quod quidam *possessorium* vocant." Gai. *Comm.* IV. 144, 145.

[2] "Item ei qui publica bona emerit ejusdem condicionis interdictum proponitur, quod appellatur *sectorium*, quod sectores vocantur qui publice bona mercantur." Gai. *Comm.* IV. 146.

[3] The interdict *Quod Legatorum* was directed against a legatee who enforced his own right by taking possession of the legacy, instead of being content to demand sureties. Vide *not.* ad § IV. Partis Tertiae. It is described as *restitutorium, adipiscendae vel recuperandae possessionis.*

[4] This interdict is for production of the testament of a *dead* person. "Hoc interdictum ad vivi tabulas non pertinet, quia verba Praetoris *reliquerit* fecerunt mentionem." D. 43. 5. 1. 10.

(A. β. i.)[1]

VI. NE QUID IN LOCO SACRO FIAT[2].

In loco sacro facere inve eum immittere quid veto.

D. 43. 6. 1. pr. U. 68.

VII. DE MORTUO INFERENDO.

Quo quave illi mortuum inferre invito te jus est, quominus illi eo eave mortuum inferre et ibi sepelire liceat, vim fieri veto.

D. 11. 8. 1. pr. U. 68.

VIII. DE SEPULCRO AEDIFICANDO.

Quo illi jus est invito te mortuum inferre, quominus illi in eo loco sepulcrum sine dolo malo aedificare liceat, vim fieri veto.

D. 11. 8. 1. 5. U. 68.

(A. β. ii.)[3]

IX. NE QUID IN LOCO PUBLICO VEL ITINERE FIAT.

Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege, senatus consulto, edicto decretove principum tibi concessum est. De eo quod factum erit interdictum non dabo[4].

D. 43. 8. 2. pr. U. 68. (J. 48. P. 64.)

In via publica itinereve publico facere immittere quid, quo ea via idve iter deterius sit, fiat, veto.

D. 43. 8. 2. 20. U. 68. (J. 48. P. 64.)

Quod in via publica itinereve publico factum immissumve habes, quo ea via idve iter deterius sit, fiat, restituas.

D. 43. 8. 2. 35. U. 68. (J. 48. P. 64.)

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[1] See Introduction, p. 28.

[2] "Quod ait Praetor, ne quid in loco sacro fiat, non ad hoc pertinet quod ornamenti causa fit, sed quod deformitatis vel incommodi." D. 43. 6. 1. 2.

[3] See Introduction, p. 28.

[4] In this *edictum monitorium*, one of the very few in the fourth part of the Edict, attention is called to the fact that the interdict is applicable only to cases of *damnum infectum*.

Quominus illi via publica itinereve publico ire agere liceat, vim fieri veto.

D. 43. 8. 2. 45. U. 68. (J. 48. P. 64.)

X. DE LOCO PUBLICO FRUENDO.

Quominus loco publico, quem is cui locandi jus fuerit fruendum alicui locavit, ei qui conduxit sociove ejus ex lege locationis frui liceat, vim fieri veto.

D. 43. 9. 1. pr. U. 68.

XI. DE VIA PUBLICA ET ITINERE PUBLICO REFICIENDO[1].

Quominus illi viam publicam iterve publicum aperire reficere liceat, dum ne ea via idve iter deterius fiat, vim fieri veto.

D. 43. 11. 1. pr. U. 68.

XII. NE QUID IN FLUMINE PUBLICO RIPAVE EJUS FIAT QUO PEJUS NAVIGETUR.

Ne quid in flumine publico ripave ejus facias, neve quid in flumine publico neve in ripa ejus inmittas quo statio iterve navigio deterior fiat[2].

D. 43. 12. 1. pr. U. 68.

Quod in flumine publico ripave ejus fiat, sive quid in flumen ripamve ejus immissum habes, quo statio iterve navigio deterior sit, fiat, restituas.

D. 43. 12. 1. 19. U. 68.

Ne quid in mari inve litore *facias* quo portus, statio iterve navigio deterius fiat[3].

D. 43. 12. 1. 17. U. 68.

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[1] This interdict and that numbered IX. deal only with country roads: the streets of the city were under the guardianship of the Aediles. See D. 43. 10.

[2] "*Stationem* dicimus a stando: is igitur locus demonstratur, ubicumque naves tuto stare possunt." D. 43. 12. 1. 13.

[3] This interdict is *utile*, not *directum*. The words in which it is introduced by Ulpian: "Labeo ait competere *tale* interdictum," show that it is a modification *pro re nata* of that next but one preceding.

XIII. NE QUID IN FLUMINE PUBLICO FIAT, QUO ALITER AQUA FLUAT ATQUE UTI PRIORE AESTATE FLUXIT.

In flumine publico inve ripa ejus facere, aut in id flumen ripamve ejus immittere quo aliter aqua fluat quam priore aestate fluxit, veto[1].

D. 43. 13. 1. pr. U. 68.

Quod in flumine publico ripave ejus factum, sive quid in flumen ripamve ejus immissum habes, si ob id aliter aqua fluit atque uti priore aestate fluxit, restituas.

D. 43. 13. 1. 11. U. 68.

XIV. UT IN FLUMINE PUBLICO NAVIGARE LICEAT.

Quominus illi in flumine publico navem ratem agere, quove minus per ripam onerare exonerare liceat, vim fieri veto.

Item ut per lacum, fossam, stagnum publicum navigare liceat, interdicam[2].

D. 43. 14. 1. pr. U. 68.

XV. DE RIPA MUNIENDA.

Quominus illi in flumine publico ripave ejus opus facere ripae agrive qui circa ripam est tuendi causa liceat, dum ne ob id navigatio deterior fiat, si tibi damni infecti in annos decem viri boni arbitratu vel cautum vel satisdatum est, aut per illum

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[1] "Idcirco aiunt Praetorem priorem aestatem comprehendisse, quia semper certior est naturalis cursus fluminum aestate potius quam hieme. Nec ad instantem aestatem, sed ad priorem interdictum hoc refertur; quia illius aestatis fluxus indubitatior est. Aestas ad aequinoctium autumnale refertur: et si forte aestate interdicetur, proxima superior aestas erit intuenda; si vero hieme, tunc non proxima hiemi aestas, sed superior erit inspicienda." D. 43. 13. 1. 8.

[2] The meanings of the terms in this *edictum monitorium* are given in D. 43. 14. 1. 3—5. "Lacus est qui perpetuam habet aquam. Stagnum est quod temporalem continet aquam ibidem stagnantem, quae quidem aqua plerumque hieme cogitur. Fossa est receptaculum aquae manu factum."

non stat, quominus viri boni arbitratu caveatur vel satisdetur, vim fieri veto[1].

D. 43. 15. 1. pr. U. 68.

(A. β. iii. a.)[2]

XVI. UNDE VI.

DE JUDICIO.

Unde tu illum vi dejecisti aut familia tua *aut procurator tuus* dejecit, de eo quaeque ille tunc ibi habuit, tantummodo intra annum; post annum de eo quod ad eum qui vi dejecit pervenerit, judicium dabo.

D. 43. 16. 1. pr. U. 69. (J. 48. P. 65.)

DE INTERDICTO.

Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi dejecisti cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo illum quaeque tunc ibi habuit restituas[3].

Cic. *pro Tull.* 44: Cic. *pro Caecin.* 19. 30, 31, 32. Gai. *Comm.* IV. 154. D. 43. 16. 1. pr. U. 69. (J. 48. P. 65.)

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[1] *In annos decem cautum vel satisdatum est.* Vide supra § LXXXV. Partis Secundae.

[2] See Introduction, p. 28.

[3] This interdict has reference only to land or buildings, or the goods thereon or therein. "Illud utique in dubium non venit, interdictum hoc ad res mobiles non pertinere. Nam ex causa furti vel vi bonorum raptorum actio competit: potest et ad exhibendum agi. Plane si quae res sunt in fundo vel in aedibus unde quis dejectus est, etiam earum nomine interdictum competere non est ambigendum." Ulp. in D. 43. 16. 1. 6.

In cases of violent dispossession the ejected party had three courses open to him: (1) to demand an interdict, and if the same were resisted, to proceed by *formula arbitraria*, supposing that variety of action to be elected by the defendant: (2) to demand an interdict, and if the defendant did not elect an *actio arbitraria*, to challenge him in a *sponsio*, accept a *restipulatio*, bring one prejudicial action and defend another (the two being practically but one), and if victorious in this double suit, follow on with a *judicium secutorium* for restitution: (3) to commence originally the action specified in the first excerpt above, which again was an *actio arbitraria*.

SPONSIO.

Unde tu me dejecisti eo si me non restituisti, sestertios tot nummos dare spondes?—Spondeo.

RESTIPULATIO.

Unde ego te dejeci, eo si te restitui, sestertios tot nummos dare spondes?—Spondeo[1].

XVII. UNDE VI ARMATA[2].

Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius vi hominibus coactis armatisve dejecisti, eo illum quaeque tunc ille ibi habuit restituas.

Cic. *pro Caecin.* 21, *et loca supra laudata.*

XVIII. QUEM FUNDUM.

Quem fundum ille a te vindicare velit, eum, si rem nolis defendere, illi restituas.

Venuleius in *Fragm. Vat.* 92.

Quem usumfructum a te vindicare velit, eum, si rem nolis defendere, illi restituas[3].

Venuleius in *Fragm. Vat.* 92.

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[1] See Cic. *pro Caecin.* 8. "Restituisse se dixit: sponsio facta est. Hac de sponsione vobis judicandum est." We are not to suppose that the defendant means to prove actual restitution, but restitution so far as there has been any ejectment. He says in fact that he has never ejected at all, and therefore by simply doing nothing, makes all the restitution required by the Praetor's order.

[2] In the time of Cicero there were two distinct interdicts, viz. UNDE VI and UNDE VI ARMATA. We cannot assert positively that the latter survived to the days of Julian, but we are inclined to think it did. By the time of Justinian it is certain that the two had become amalgamated; the first-named interdict, *interdictum quotidianum*, *interdictum de vi quotidiana*, as Cicero calls it in *pro Caecin.* 31, 32, having absorbed the other *de vi armata.*

[3] "Venuleius libro IIII De interdictis, sub titulo: *a quo usus fructus petetur, si rem nolit defendere.* Sicut corpora vindicanti, ita et jus satisdari oportet: et ideo necessario ad exemplum interdicti QUEM FUNDUM proponitur etiam ei interdictum QUEM USUM-

XIX. UTI POSSIDETIS[1].

Uti nunc possidetis eum fundum quo de agitur, quod nec vi nec clam nec precario alter ab altero possidetis, ita possideatis. Adversus ea vim fieri veto.

Festus *sub verb.* Possessio. Gai. *Com.* IV. 160.

Uti eas aedes quibus de agitur nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto.

De cloacis hoc interdictum non dabo; neque pluris quam quanti ea res erit intra annum quo primum experiundi potestas fuerit, agere permittam.

D. 43. 17. 1. pr. U. 69. (P. 65.)

FRUCTUM VINDICARE VELIT de restituendo usufructu." *Fragm. Vat.* 92.

[1] This is an instance of a double interdict: in fact UTI POSSIDETIS and UTRUBI are the only double interdicts of which we have knowledge. In ordinary simple interdicts there was no dispute as to the fact of possession, and therefore it was clear that the interdict must be applied for by the party out of possession and directed against the party in possession. But in a double interdict the very question to be settled was which had possession at the moment of suit, or which had held it during the greater part of the preceding year. These interdicts were preliminary to a *vindicatio*, and each litigant was striving to have the advantage of being declared in possession, so that the other might become plaintiff, and thereby have the burden of proof of ownership cast upon him. Hence both parties were summarily put out of possession by the Praetor, and then proceeded to bid for the interim possession—*fructus licitabant*—in the suit which was to decide the final possession, according to which final possession one would be plaintiff and the other defendant in the suit as to ownership. To discourage vexatious conduct, the successful bidder for the interim possession was mulcted in the amount of his tender, besides restoring the actual profits accruing to him, if he failed to prove himself entitled to the final possession. When once the final possession was settled, the proceedings were by *sponsio*, *restipulatio*, *formulae praejudiciales*, *stipulatio de re restituenda* and *formula secutoria*, as in the case of a simple interdict. Vide Gai. *Comm.* IV. 166—169, and §§ I., XVI. Partis Quartae supra.

(A. β. iii. *b*)[1].

XX. DE SUPERFICIEBUS.

Uti ex lege locationis sive conductionis superficie qua de agitur, nec vi nec clam nec precario alter ab altero fruemini, quo minus fruamini, vim fieri veto.

Si qua alia actio de superficie postulabitur, causa cognita dabo.

D. 43. 18. 1. pr. U. 70. (G. 25.)

XXI. DE ITINERE ACTUQUE PRIVATO[2].

Quo itinere actuque privato quo de agitur vel via hoc anno nec vi nec clam nec precario ab illo usus es, quominus ita utaris, vim fieri veto.

D. 43. 19. 1. pr. U. 70. (P. 66.)

Quo itinere actuque *privato quo de agitur vel via* hoc anno non vi, non clam, non precario ab *illo* usus es, quominus id iter actumque *viamque* ut tibi jus est reficias, vim fieri veto.

Qui hoc interdicto uti volet, is adversario damni infecti quod per ejus vitium datum sit caveat[3].

D. 43. 19. 3. 11. U. 70. (P. 66.)

XXII. DE AQUA COTTIDIANA ET AESTIVA.

Uti hoc anno aquam qua de agitur non vi, non clam, non precario ab illo duxisti, quominus ita ducas vim fieri veto[4].

D. 43. 20. 1. pr. U. 70. (J. 49.)

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[1] See Introduction, p. 28.

[2] The right to the easement is immaterial; the mere fact of user is sufficient to entitle the claimant to the interdict; for if the right be disputed, the adversary ought to abstain from violence and proceed by action. D. 43. 19. 1. 2.

[3] Vide § LXXXV. Partis Secundae.

[4] "Hoc interdictum prohibitorium, et interdum restitutorium est, et pertinet ad aquam cottidianam. Cottidiana autem aqua non illa est, quae cottidie ducitur, sed ea qua quis cottidie possit uti, si vellet, quamquam cottidianam interdum hieme ducere non expediat, etsi possit duci." D. 43. 20. 1 and 2. "Quod autem scriptum est in interdicto: *uti hoc anno aquam duxisti*, hoc est non cottidie, sed hoc anno vel una die, vel una nocte. Ergo cottidiana quidem aqua ea est, quae cottidie duci possit, vel hieme vel aestate,

Uti priore aestate aquam qua de agitur nec vi, nec clam, nec precario ab illo duxisti, quominus ita ducas vim fieri veto[1].

Inter heredes, et emptores, et bonorum possessores interdicam.

D. 43. 20. 1. 29. U. 70. (J. 49.)

Quo ex castello illi aquam ducere ab eo cui ejus rei jus fuit permissum est, quominus ita uti permissum est ducat, vim fieri veto[2].

Quandoque de opere faciendo interdictum erit, damni infecti caveri jubebo.

D. 43. 20. 1. 38. U. 70.

XXIII. DE RIVIS.

Rivos, specus, septa reficere, purgare aquae ducendae causa, quo minus liceat illi, dum ne aliter aquam ducat, quam uti priore aestate non vi, non clam, non precario a te duxit, vim fieri veto[3].

D. 43. 21. 1. pr. U. 70. (P. 66.)

XXIV. DE FONTE.

Uti de eo fonte quo de agitur, hoc anno aqua nec vi, nec

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etsi aliquo momento temporis ducta non sit; aestiva ea quae cottidie quidem duci possit, ducatur autem aestate tantum, non et hieme, non quia non possit et hieme, sed quia non solet. Loquitur autem praetor in hoc interdicto de ea aqua sola quae perennis est; nulla enim alia aqua duci potest, nisi quae perennis est." D. 43. 20. 1. 4 and 5.

[1] "Haec interdicta de aqua, item de fonte, ad eam aquam pertinere videntur quae a capite ducitur, non aliunde." D. 43. 20. 1. 7.

[2] "Ex castello ducit, id est ex eo receptaculo quod aquam publicam suscipit." D. 43. 20. 1. 39.

[3] "*Specus* est locus ex quo despicitur. *Septa* sunt quae ad incile opponuntur aquae derivandae compellendaeque ex flumine causa. *Incile* autem est locus depressus ad latus fluminis ex eo dictus quod incidatur; inciditur enim vel lapis vel terra, unde primum aqua ex flumine agi possit." Ulp. in D. 43. 21. 1. 3—5.

clam, nec precario ab illo usus es, quominus ita utaris, vim fieri veto.

De lacu, puteo, piscina item interdicam.

D. 42. 22. 1. pr. U. 70.

Quominus fontem quo de agitur purges, reficias, ut aquam coercere, utique ea possis, dum ne aliter utaris, atque uti hoc anno non vi, non clam, non precario ab illo usus es, vim fieri veto.

D. 42. 22. 1. 6. U. 70.

XXV. DE CLOACIS.

Quominus illi cloacam, quae ex aedibus eius in tuas pertinet, qua de agitur, purgare, reficere liceat, vim fieri veto[1].

Damni infecti quod operis vitio factum sit caveri jubebo.

D. 43. 23. 1. pr. U. 71.

Quod in cloaca publica factum sive immissum habes, quo usus eius deterior sit, fiat, restituas.

Item ne quid fiat immittaturve interdicam.

D. 43. 23. 1. 15. U. 71.

XXVI. QUOD VI AUT CLAM.

Quod vi aut clam factum est, qua de re agitur, *si non plus quam annus est* cum experiundi potestas *esset*, restituas[2].

D. 43. 24. 1. pr. U. 71. (J. 48. P. 67.)

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[1] "Quod ait Praetor: *pertinet*, hoc significat quod ex aedibus ejus in tuas pertinet, hoc est dirigitur, extenditur, pervenit." D. 43. 23. 1. 10.

[2] The object of the interdict QUOD VI AUT CLAM is the removal of an *opus novum*. "Hoc interdictum ad ea sola opera pertinet quaecunque in solo vi aut clam fiunt." D. 43. 24. 1. 4. It is not therefore a possessory interdict, whereas the UNDE VI is *recuperandae possessionis*.

"Parvi refert utrum jus habuerit faciendi an non: sive enim jus habuit, sive non, tamen tenetur interdicto, propterea quod vi aut clam fecit; tueri enim jus suum debuit, non injuriam comminisci." D. 43. 24. 1. 2.

We insert the italicized words in the text on the strength of the following passage: "hoc interdictum in heredem caeterosque suc-

XXVII. DE REMISSIONIBUS.

Quod jus sit illi prohibere, ne se invito fiat, in eo nuntiatio teneat. Ceterum nuntiationem missam facio[1].

D. 43. 25. 1. pr. U. 71.

XXVIII. NE QUID POST OPERIS NOVI NUNTIATIONEM FIAT[2].

Quem in locum nuntiatum est, ne quid novum opus fieret, qua de re agitur, quod in eo loco, antequam nuntiatio missa fuerit, aut in ea causa esset ut remitti deberet, factum est, id restituas.

D. 39. 1. 20. pr. U. 71.

XXIX. QUI SATISDEDIT EUM NE QUIS PROHIBEAT FACERE VOLENTEM[3].

Quem in locum nuntiatum est, ne quid operis novi fieret, qua de re agitur, si de ea re satisdatum est, quod eius cautum sit, aut per te stat quominus satisdetur, quominus illi in eo loco opus facere liceat, vim fieri veto.

D. 39. 1. 20. 9. U. 71.

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cessores datur in id quod ad eos pervenit, et post annum non competit. Annus autem cedere incipit ex quo id opus factum perfectum sit, aut fieri desiit, licet perfectum non sit; alioquin si a principio operis coepti annum quis numeret, necesse est cum his qui opus tardissime facerent saepius agi." Ulp. in D. 43. 24. 15. 3 and 4.

1 "When a man has a right to forbid a thing being done against his will, let his *nuntiatio novi operis* be binding. In other cases I shall make the *nuntiatio* void."

A *remissio* may be granted either on the order of the Praetor or by consent of the party who has served the other with a *nuntiatio novi operis*. Hence *remissiones* might have been treated of under § LXXXIV. Partis Secundae, as appropriately as in their present position in the Edict.

2 See notes on § LXXXIV. Partis Secundae.

3 Ibid.

XXX. DE PRECARIO[1].

Quod precario ab illo habes, aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas.

D. 43. 26. 2. pr. U. 71. (G. 25, 26. J. 49.)

XXXI. DE ARBORIBUS CAEDENDIS.

Quae arbor ex aedibus tuis in aedes illius impendet, si per te stat quominus eam adimas, tunc quo minus illi eam arborem adimere sibique habere liceat, vim fieri veto.

D. 43. 27. 1. pr. U. 71.

Quae arbor ex agro tuo in agrum illius impendet, si per te stat quo minus pedes quindecim a terra eam altius coerceas, tunc quominus illi ita coercere lignaque sibi habere liceat, vim fieri veto.

D. 43. 27. 1. 7. U. 71.

XXXII. DE GLANDE LEGENDA.

Glandem quae ex illius agro in tuum cadit, quominus illi tertio quoque die legere auferre liceat, vim fieri veto[2].

D. 43. 28. 1. pr. U. 71.

(A. β. iii. *c*)[3].

XXXIII. DE HOMINE LIBERO EXHIBENDO.

Quem liberum hominem dolo malo retines, exhibeas[4].

D. 43. 29. 1. pr. U. 71.

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[1] "Precarium est quod precibus petenti utendum conceditur tamdiu quamdiu is qui concessit patitur." D. 43. 26. 1 pr.

[2] "Glandis nomine omnes fructus continentur." D. 43. 28. 1. 1.

[3] See Introduction, p. 28.

[4] "Exhibere est in publicum producere, et videndi tangendique hominis facultatem praebere: proprie autem exhibere est extra secretum habere." D. 43. 29. 3. 8.

Any person whatever, whether related or a stranger to the freeman alleged to be detained, could apply for this interdict.

"Hoc interdictum omnibus competit: nemo enim prohibendus est libertati favere." D. 43. 29. 3. 9.

XXXIV. DE LIBERIS EXHIBENDIS.

Qui quaeve in potestate Lucii Titii est, si is eave apud te est, dolove malo tuo factum est quominus apud te esset, ita eum eamve exhibeas.

D. 43. 30. 1. pr. U. 71.

XXXV. DE LIBERIS DUCENDIS.

Si Lucius Titius in potestate Lucii Titii est, quominus eum Lucio Titio ducere liceat, vim fieri veto.

D. 43. 30. 3. pr. U. 71.

In hoc interdicto, donec res judicetur, feminam, praetextatum, eumque qui proxime praetextati aetatem accedet, interim apud matremfamilias deponi jubebo[1].

D. 43. 30. 3. 6. U. 71.

(A. *β*. iii. *d*.)[2]

XXXVI. UTRUBI[3].

Utrubi hic homo quo de agitur, maiore parte huiusce anni fuit, quominus is eum ducat, vim fieri veto.

D. 43. 31. 1. pr. Gai. *Comm.* IV. 160. U. 72.

XXXVII. NE VIS FIAT EI QUI IN POSSESSIONEM BONORUM MISSUS EST.

Si quis dolo malo fecerit quominus quis permissu meo, ejusve cujus de ea re jurisdictio fuerit, in possessionem bonorum sit, in eum in factum judicium, quanti ea res fuit ob quam in possessionem missus erit, dabo[4].

D. 43. 4. 1. pr. U. 72. (P. 59.)

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[1] "Proxime aetatem praetextati accedere eum dicimus qui puberem aetatem nunc ingressus est. Cum audis matremfamilias, accipe notae auctoritatis feminam." D. 43. 30. 3. 6.

[2] See Introduction, p. 28.

[3] As to the process under this interdict see note on UTI POSSIDETIS, § XIX. above.

[4] Paulus discussed this topic in connection with *possessio bonorum*: and properly so, because the remedy spoken of is an action, not an interdict. But doubtless there was an interdict also, which accounts for Ulpian's allocation.

(A. β. iii. *e.*)[1]

XXXVIII. DE MIGRANDO.

Si is homo, quo de agitur, non est ex his rebus, de quibus inter te et actorem convenit, ut quae in eam habitationem, qua de agitur, introducta, importata, ibi nata factave essent, ea pignori tibi pro mercede eius habitationis essent; sive ex his rebus est et ea merces tibi soluta, eove nomine satisfactum est, aut per te stat quominus solvatur; ita quominus ei qui eum pignoris nomine induxit inde abducere liceat, vim fieri veto.

D. 43. 32. 1. pr. U. 73. (G. 26.)

XXXIX. DE SALVIANO INTERDICTO[2].

D. 43. 33. (J. 49. U. 73.)

XL. DE FRAUDATORIO INTERDICTO[3].

Quae Lucius Titius fraudandi causa sciente te in bonis quibus de agitur fecit, ea illis, si eo nomine quo de agitur actionem ex edicto meo competere esseve oportet, et si non plus quam annus est cum de ea re qua de agitur experiundi potestas est, restituas.

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[1] See Introduction, p. 28.

[2] The crops of an agricultural tenant and the furniture of the tenant of a house were by implication of law pledged to the landlord for the rent. D. 20. 2. 3: 20. 2. 4. pr.: 20. 2. 7. Other articles "illata et invecta ut ibi sint" might be pledged by special agreement, and in case of their removal before payment of the rent the landlord could avail himself of this interdict; or, if he preferred it, might bring the *actio Serviana*, alluded to in Just. *Inst.* IV. 6. 7. The *actio Serviana* mentioned by Gaius in *Comm.* IV. 35 is obviously another matter altogether.

[3] The plaintiff in this case has an election between the *actio Pauliana*, mentioned in § VIII. Partis Tertiae, supra, and the *interdictum fraudatorium*. The name of the interdict is given in D. 46. 3. 96. pr.

The *edictum monitorium* at the end of the excerpt obviously refers to the *actio Pauliana*.

Interdum causa cognita, etsi scientia non sit, in factum actionem dabo.

D. 42. 8. 10. pr. U. 73. (J. 49. G. 26. P. 68.)

(B) DE EXCEPTIONIBUS, REPLICATIONIBUS ET PRAESCRIPTIONIBUS.

(J. 50-54. G. 29, 30. P. 69-71. U. 74-76.

DE EXCEPTIONIBUS.

(B. *a.*)

I. SI QUIS VADIMONIIS SUIS NON OBTEMPERAVIT.

...Si neque municipalis muneris causa sine suo dolo malo impeditus; neque ad testimonium desideratus; neque valetudine vel tempestate, vel vi fluminis prohibitus; neque a magistratu retentus; neque rei capitalis ante condemnatus; neque funere domestico impeditus; neque in servitute hostiumve potestate retentus; neque reipublicae causa afuerit...

D. 2. 11. 2. 1, 2, 3 and 9: 2. 11. 4. pr., 2 and 3: 2. 11. 6. U. 74. (G. 29. P. 69.)

II. DE PRAEJUDICIIS.

...Si in ea re qua de agitur hereditati (*fundo, aedibus etc.*) praejudicium non fiat...

Gai. *Comm.* IV. 133. D. 44. 1. *rub.* and 13. (J. 50.)

III. REI IN JUDICIUM DEDUCTAE.

...Si ea res in judicium antea non venit...

Cic. *de Orat.* I. 37. Gai. *Comm.* IV. 106, 107. D. 44. 2. (G. 30. J. 51. P. 70. U. 75.)

IV. REI JUDICATAE[1].

...Si ea res judicata non sit inter Aulum Agerium et Numerium Negidium...

D. 44. 2. 9. 2. Gai. *Comm.* IV. 106, 107. U. 75. (J. 51. G. 30. P. 70.)

[1] "De eadem re agere videtur et qui non eadem actione agit qua ab initio agebat, sed etiam si alia experiatur de eadem tamen re." Ulp. in D. 44. 2. 5. pr.

V. PACTI CONVENTI[1].

...Si inter Aulum Agerium et Numerium Negidium non convenit ne ea pecunia peteretur...

Gai. *Comm.* IV. 119.

VI. TRANSACTI NEGOTII.

D. 2. 15. 3. 2. Scaevola I.

VII. LITIS DIVIDUAE.

Gai. *Comm.* IV. 122.

VIII. REI RESIDUAE.

Gai. *Comm.* IV. 122.

IX. DE ANNALIBUS[2].

...*Si non plus quam annus est cum primum Aulus Agerius* de ea re qua de agitur experiundi potestatem haberet...

D. 44. 3. I. pr. U. 74.

X. DE COGNITORIIS ET PROCURATORIIS.

Gai. *Comm.* IV. 124. *Fragm. Vat.* 322. D. 3. 3. 57. I. U. 74. (P. 71. U. 75.)

XI. DE DOLO MALO.

...Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat...

D. 44. 4. 2. I. Gai. *Comm.* IV. 119. U. 76. (G. 30. P. 71.)

XII. DE PECUNIA NON NUMERATA[3].

Just. *Inst.* III. 21.

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[1] This exception is mentioned in Just. *Inst.* IV. 13. 9 and 10. and in IV. 14. 4. In the Digest it is not mentioned by name, but treated as a variety of the *exceptio doli mali.*

[2] See "de calumniatoribus" (§ XI. Partis Primae): "de in integrum restitutionibus" (§ XII. *e.* Partis Primae): "de publicanis" (§ LXXXVIII. Partis Secundae): "de vi bonis raptis" (§ LXXXIX. Partis Seundae): "de incendio ruina &c." (§ XC. Partis Secundae).

[3] Possibly this exception did not exist in a separate form in the time of Gaius and Julian, but the matter of it was pleaded under the *exceptio doli mali.* See Gai. *Comm.* IV. 119.

XIII. MERCIS NON TRADITAE.

...Si Aulo Agerio res quam emerit tradita sit...

Gai. *Comm.* IV. 126.

...Si ea pecunia qua de agitur non pro ea re petitur quae venit neque tradita est...

D. 19. 1. 25. pr. J. 54.

XIV. JUSTI DOMINII[1].

...Si ea res possessoris non sit...

D. 6. 2. 17. Papin. 10 *Quaest.* Neratius 3 *Memb.*

XV. REI REDHIBITAE.

Si ea pecunia, qua de agitur, non ob hominem illum expromissa est, qui redhibitus est...

D. 44. 1. 14. pr. Alfenus Varus 2. (P. 71. U. 74.)[2]

XVI. REI VENDITAE ET TRADITAE[3].

...Si non Aulus Agerius eam rem qua de agitur Numerio Negidio vendidit, et ea ei tradita est ..

D. 21. 3. 2. Pomponius *ex Plautio* 2. (U. 76.)

XVII. DE LITIGIOSIS[4].

Gai. *Comm.* IV. 117: *Fragm. de Jure Fisci* 8.

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1 "Exceptio justi dominii Publicianae objicienda est." D. 6. 2. 16. "Publiciana actio non ideo comparata est ut res domino auferatur: ejusque rei argumentum est primo aequitas, deinde exceptio SI EA RES POSSESSORIS NON SIT: sed ut is qui bona fide emit, possessionemque ejus ex ea causa nanctus est, potius rem habet." D. 6. 2. 17.

2 In verification of these references see D. 44. 4. 5. 4 and D. 21. 1. 59.

3 "Marcellus scribit: si alienum fundum vendideris, et tuum postea factum petas, hac te exceptione recte repellendum. Sed et si dominus fundi heres venditori existat, idem erit dicendum." D. 21. 3. 1. pr. and 1.

4 "Qui contra edictum divi Augusti rem litigiosam a non possidente comparavit, praeterquam quod emptio nullius momenti est, poenam quinquaginta aureorum fisco repraesentare compellitur. Res autem litigiosa videtur de qua lis apud suum judicem delata est." *Fragm. de Jure Fisci* 8.

XVIII. QUOD METUS CAUSA.

...Si in ea re nihil metus causa factum sit *neque fiat*...

D. 44. 4. 4. 33. U. 76. (G. 30. P. 71.)

XIX. ONERANDAE LIBERTATIS CAUSA[1].

...Si non onerandae libertatis causa ea res promissa est...

D. 44. 5. 2. 2. P. 71. (U. 76.)

XX. SI QUID CONTRA LEGES SENATUSVE CONSULTUM FACTUM ESSE DICETUR.

...Si in ea re nihil contra legem illam factum sit....

D. 44. 1. 3. (G. 1.)

...Si non donationis causa mancipavit vel promisit se daturum[2]....

Paulus in *Fragm. Vat.* 310.

XXI. JURISJURANDI[3].

Si Numerius Negidius Aulo Agerio deferente non juraverit rem Auli Agerii non esse.

D. 12. 2. 11. pr.: 44. 5. 1. pr. (U. 76.)

XXII. NEGOTII IN ALEA GESTI[4].

D. 44. 5. 2. 1. (P. 71.)

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1 "Si servus promittat domino pecuniam ut manumittatur, quum alias non esset manumissurus dominus, eamque liber factus spondeat, dicitur non obstare exceptionem patrono si eam petat; non enim onerandae libertatis causa haec pecuniae promissa est; alioquin iniquum esset dominum et servo carere, et pretio ejus." Paul. in D. 44. 5. 2. 2.

2 "Paulus, libro XXIII. *ad edictum, de brevibus.* Perficitur donatio in exceptis personis sola mancipatione vel promissione, quoniam neque Cinciae legis exceptio obstat, neque in factum 'si non donationis causa mancipavi, vel promisi me daturum'; idque et divus Pius rescripsit." *Fragm. Vat.* 310. Ed. Laboulaye.

3 "Jusjurandum vicem rei judicatae obtinet: non immerito, quum ipse quis judicem adversarium suum de causa sua fecerit, deferendo ei jusjurandum." Ulp. in D. 44. 5. 1. pr.

4 "Si in alea rem vendam ut ludam, et evicta re conveniar exceptione summovebitur emptor." D. 44. 5. 2. 1. See also D. 22. 3. 19. 4.

DE REPLICATIONIBUS.

(B. *b.*)

I. *Adversus exceptionem* PACTI CONVENTI.

...aut si non postea convenerit ut eam pecuniam petere liceret...

Gai. *Comm.* IV. 126.

II. *Adversus exceptionem* MERCIS NON TRADITAE.

...aut si praedictum est ne aliter emptori res traderetur quam si pretium emptor solveret...

Gai. *Comm.* IV. 126.

(B. *c.*) DE PRAESCRIPTIONIBUS[1].

I. Ea res agatur cujus dies fuit.

Gai. *Comm.* IV. 131, 136.

II. Ea res agatur de fundo mancipando.

Gai. *Comm.* IV. 131. *a.*

III. Ea res agatur, quod Aulus Agerius de Lucio Titio incertum stipulatus est, quo nomine Numerius Negidius sponsor est, cuius rei dies fuit.

Gai. *Comm.* IV. 137.

IV. Ea res agatur quod Numerius Negidius pro Lucio Titio incertum fide sua esse jussit, cujus rei dies fuit.

Gai. *Comm.* IV. 137.

(C.) DE STIPULATIONIBUS PRAETORIIS[2].

D. 46. 5-8. (G. 27-29. J. 52-58. P. 72-78. U. 77-81.)

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[1] Julian threw into the form of *exceptiones* the *praescriptiones* which, under the older system, had been put in on behalf of plaintiffs. An example of the ancient form is preserved for us in Gai. *Comm.* IV. 133: EA RES AGATUR: SI IN EA RE PRAEJUDICIUM HEREDITATI NON FIAT; and this in its more modern guise is the *exceptio* numbered II. above. See also Gai. *Comm.* IV. 136, 137.

[2] Praetorian stipulations are of three kinds, judicial, cautional, common.

"Praetoriarum stipulationum tres videntur esse species: judi-

(C. *a.*) DE COMMUNIBUS STIPULATIONIBUS.

I. IN JUDICIO SISTENDI CAUSA.

(J. 55. G. 29. P. 75. U. 77)[1].

(C. *b.*) DE JUDICIALIBUS STIPULATIONIBUS.

II. PRO PRAEDE LITIS VINDICIARUM.

III. JUDICATUM SOLVI[2].

D. 46. 7. (G. 27. J. 55. P. 74. U. 77.)

(C. *c.*) DE CAUTIONALIBUS STIPULATIONIBUS.

IV. LEGATORUM FIDEICOMMISSORUMVE SERVANDORUM CAUSA[3].

D. 36. 3. (G. 27. P. 75. U. 79.)

V. DE USUFRUCTU.

Ea re cujus ususfructus tibi legatus est usurum te boni viri arbitratu, et quum ususfructus ad te pertinere desinat, quumve moriaris aut capite minutus sis, id quod inde exstabit resti-

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ciales, cautionales, communes. Iudiciales eas dicimus, quae propter iudicium interponuntur, ut ratum fiat: ut judicatum solvi, et ex operis novi nuntiatione. Cautionales sunt autem, quae instar actionis habent, et ut sit nova actio intercedunt: ut de legatis stipulationes, et de tutela, et ratam rem haberi, et damni infecti. Communes sunt stipulationes, quae fiunt judicio sistendi causa." D. 46. 5. 1. 1—3.

In general these stipulations have to be guaranteed by sureties, but in a few instances, as *damni infecti causa* (vide § LXXXV. Partis Secundae) a mere promise is sufficient.

[1] In proof of these references see D. 2. 11. 13: 2. 11. 8: 2. 8. 10: 2. 11. 9.

[2] The forms of this interdict and of the one preceding will be found in § VI. Partis Secundae.

[3] This security had to be given when a legacy or fideicommissum was left under condition or for future payment, and the heir had the right to the interim possession and enjoyment. See, in connection with the topic, § II. Partis Secundae.

tutum iri, et huic stipulationi dolum malum abesse abfuturumque esse spondes? Spondeo[1].

D. 7. 9. U. 79. (P. 15.)

VI. DE RESTITUENDO LEGATO EVICTA HEREDITATE[2].

Si evicta fuerit hereditas, quod legatorum nomine tibi datum est, boni viri arbitratu mihi redditum iri spondes?—Spondeo.

D. 31. 1. 48. 1 : 35. 3. 3. 6. U. 79. (P. 75.)

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[1] This stipulation is restored as above on the authority of the following passages:

"Si cujus rei ususfructus legatus sit, aequissimum Praetori visum est de utroque legatarium cavere, et usurum se boni viri arbitratu, et quum ususfructus ad eum pertinere desinet restituturum quod inde exstabit." D. 7. 9. 1. pr.

"Habet stipulatio duas causas: unam, si aliter quis utatur quam vir bonus arbitrabitur, aliam de usufructu restituendo. Quarum prior statim committitur quam aliter fuerat usus, et saepius committetur, sequens committitur finito usufructu." D. 7. 9. 1. 6.

"Exprimi debent hi duo casus in stipulatione: *quum morieris aut capite minutus eris* dari." D. 7. 9. 7. 1.

"Huic stipulationi *dolum malum abesse abfuturumque esse* continetur." D. 7. 9. 5 pr.

In the case of "res quae usu consumuntur vel minuantur," the *stipulatio* was slightly altered, as we see from D. 7. 5. 7, "Si vini, olei, frumenti ususfructus legatus erit, proprietas ad legatarium transferri debet, et ab eo cautio desideranda est, ut quandoque is mortuus aut capite deminutus sit, ejusdem qualitatis res restituatur, aut aestimatis rebus certae pecuniae nomine cavendum est: quod et commodius est. Idem scilicet de ceteris quoque rebus quae abusu continentur intelligemus."

[2] "Qui petent *a bonorum possessore legata sua* cavere debebunt, si hereditas evicta fuerit, quod legatorum nomine datum sit redditum iri." Proculus in D. 31. 1. 48. 1.

"Si legatarius heredi, qui controversiam hereditatis patitur iam vel sperat, de restituendo legato sibi praestito caverit, et evicta hereditas sit, sed negligentia vel dolo ejus qui legatum praestitit, dicemus non committi stipulationem propter viri boni arbitrium, quod inest huic stipulationi." Ulp. in D. 35. 3. 3. 6.

VII. SI CUI PLUS QUAM PER LEGEM FALCIDIAM LICUERIT LEGATUM ESSE DICETUR.

Si apparuerit te amplius legatorum nomine cepisse quam e lege Falcidia capere licebit, quanti ea res erit, tantum pecuniam te daturum, dolumque malum in ea re abesse abfuturumque esse spondes?—Spondeo[1].

D. 35. 3. 1. pr. U. 79. (P. 75.)

VIII. DE BONIS CONFERENDIS.

Quod ex portione mea fueris consecutus, id cum bona propria conferre coeperis, te mihi restituturum spondes?—Spondeo[2].

D. 36. 3. 5. 1. (G. 27. P. 75. U. 79.)

IX. REM PUPILLI VEL ADOLESCENTIS SALVAM FORE[3].

D. 46. 6. (G. 27. P. 76. U. 79.)

X. RATAM REM HABERI[4].

Quando tu illius ex mandato (*illius nomine*) mecum agere

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1 "Si cui plus quam licuerit legetur, et dubitari juste possit utrum lex Falcidia locum habitura est nec ne, subvenit Praetor heredi, ut ei legatarius satisdet; ut si apparuerit cum amplius legatorum nomine cepisse, quam e lege Falcidia capere licebit, quanti ea res erit, tantam pecuniam det, dolusque malus ab eo abfuturus sit." Ulp. in D. 35. 3. 1 pr.

2 When one of several brothers receives solely the grant of *bonorum possessio*, he ought to give sureties to the others for throwing into hotchpot his own property derived from the common ancestor. If he cannot do this, the other brothers take from him the administration on furnishing similar security. If none of them can provide sureties, the property is put into the hands of a *sequester*, who proceeds to administer. The same rule was applied in all cases where possession was given to a man partly for his own benefit and partly for that of other people. D. 36. 3. 5. 1. Paul. *Sent.* 5. 9. 4.

3 Gai. *Comm.* I. 199, 200.

4 This is the stipulation entered into by a *procurator*. A *cognitor* was absolved from it. Gai. *Comm.* IV. 97, 98.

vis (*illam rem a me petis*), amplius non petiturum eum cujus de ea re actio, petitio, persecutio est; illam rem ratam habiturum eum, heredemve ejus, eumve ad quem ea res pertinet; quodsi non ita factum sit quanti ea res est tantam pecuniam dari, dolumque malum abesse abfuturumque esse spondes?—Spondeo[1].

D. 46. 8. (J. 56. P. 76. U. 80.)

XI. DE EVICTIONE.

D. 21. 2.

Si qui illam rem partemve quam quis ex ea evicerit, quominus illum (emptorem) eumve ad quem ea res pertinebit habere recte liceat, quanti id erit quod ita evictum fuerit, tantam pecuniam duplam dari spondes?—Spondeo[2].

D. 21. 2. (G. 28. J. 57, 58. P. 76, 77. U. 80, 81.)

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[1] The *procurator* could sue *ex mandato alterius*, or merely *alterius nomine* without proving a mandate: Gai. *Comm.* IV. 84. Hence the italicized opening words in the text. The rest of the restitution is based on the following passages:

"In stipulatione cavetur *non petiturum eum cujus de ea re actio, petitio, persecutio sit, et ratum habituros omnes ad quos ea res pertinebit.*" Jul. in D. 46. 8. 23.

"Cujus nomine quis praeter cognitorem actionem sibi dari postulabit, is eum boni viri arbitratu defendat, et ei quocum alterius nomine aget, *id ratum habere eum ad quem ea res pertinet* boni viri arbitratu satisdet." D. 3. 3. 33. 3. See also D. 46. 8. 22. 7.

"Hoc enim facere verba stipulationis: *quanta ea res erit.*" Paul. in D. 46. 5. 2. 2.

"Difficile est existimari *doli* clausulam committi." Jul. in D. 46. 8. 22. 7.

The words "amplius non petiturum eum cujus de ea re actio, petitio, persecutio est" would of course be omitted when the *procurator* who entered into the stipulation was acting for a defendant.

[2] This stipulation is in its latter part identical with the Aedilitian stipulation given on page 133: so that we refer the reader thither for our authority in its restitution.

XII. DE OPERIS NOVI NUNTIATIONE.

Quem in locum nuntiatum est ne quid operis novi fiat, quod in o loco intra diem illum opus factum erit, si judicatum fuerit *us tibi non esse opus facere*, sive ante rem judicatam causa uae acciderit, neque res defendatur, a te heredeve tuo rem oni viri arbitratu restitui, quodsi ita non restitutum fuerit, uanti ea res erit tantam pecuniam dari, si hoc mihi placuerit, jusque rei, dolum malum abesse abfuturumque esse spondes? pondeo[1].

D. 39. 1. U. 80. (P. 77.)

XIII. DE DAMNO INFECTO.

Quod tu illud opus facturus es, si quid aedium, arborum, oci, operis vitio intra illum diem damnum factum erit, sive uid ibi ruet, scindetur, fodietur, aedificabitur, quanti ea res rit tantam pecuniam mihi heredique meo, eive ad quem ea res

---

[1] This stipulation is to be gathered from the following:

"Si dominus opus novum nuntiaverit *intra diem* quae stipula- ione ex operis novi nuntiatione interposita comprehensa est, com- nittitur stipulatio: sed si praeterita ea die dominus nuntiaverit, on committitur." Jul. in D. 39. 1. 13. 1.

"Habet autem ista stipulatio conditionem ut ita demum com- nittatur, *si judicatum fuerit, sive ante rem judicatam causa quae cciderit, neque res defendatur*, et *de dolo malo* subjicitur clausula." Jlp. in D. 39. 1. 21. 2.

"Quodsi is cui opus novum nuntiatum erat decesserit, vel aedes lienaverit, non extinguitur novi operis nuntiatio; idque ex eo pparet, quod in stipulatione quae ex hac causa interponitur etiam *eredis mentio* fit." Paul. in D. 39. 1. 8. 7.

"Rei restitutionem (praetoriae stipulationes continent) sicuti tipulatio ex operis novi nuntiatione, qua cavetur *ut opus restitua- ur.*" Paul. in D. 46. 5. 2. 1.

"Sive autem res judicetur, sive res non defendatur, stipulatio in d committitur ut *viri boni arbitratu res restituatur. Quodsi ita estitutum non erit, quanti ea res erit, tantam pecuniam dabit, si oc petitori placuerit.*" Ulp. in D. 39. 1. 21. 4.

"Ceterum si ita cautum fuerit: *quanti ea res erit.*" Ulp. in D. 9. 1. 21. 7.

pertinet, te heredemque tuum, eumve ad quem ea res pertinet daturum spondes? Spondeo[1].

D. 39. 2. (G. 28. J. 58. P. 78. U. 81.)

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[1] See Gai. *Comm.* IV. 31.

"Ut ne quid *aedium, loci, operisve vitio damnum factum sit* stipulatio interponitur." Ulp. in D. 39. 2. 24. 2.

"Stipulatio committitur quum *vitio operis* damnum factum sit." Ulp. in D. 39. 2. 24. 6.

"Stipulationem istam in qua haec comprehenduntur: *si quid arborum locive vitio.*" Ulp. in D. 39. 2. 24. 9.

"Huic stipulationi debet dies esse insertus, intra quem si quid damni contigerit, cautio locum habet: neque enim in infinitum obligatus esse debet stipulatione. Ipse igitur praetor diem dabit stipulationi, aestimatione habita ex causa, et ex qualitate ejus damni, quod contingere speratur." Ulp. in D. 39. 2. 13. 15.

"In stipulatione damni infecti accidere potest ut is qui stipulatus est subinde agat; cavet enim *si quid ibi ruet, scindetur, fodietur, aedificabitur.*" Pomponius in D. 46. 8. 18.

"Quod in stipulatione est: *sive quid ibi ruet.*" Alfenus Varus in D. 39. 2. 43. pr.

"In hoc fit stipulatio, *quanti ea res erit.*" Paul. in D. 39. 2. 18. 10.

"Adjicitur in hac stipulatione et heredum nomen, vel successorum eorumque ad quos ea res pertinet." Ulp. in D. 39. 2. 24. 1.

PARS QUINTA.

EDICTUM AEDILITIUM[1].

D. 21. 1. G. 1, 2 *ad ed. aed.* P. 1, 2 *ad ed. aed.* U. 1. 2. *ad ed. aed.*

I. DE MANCIPIIS.

Qui mancipia vendunt, certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errove sit, noxave solutus non sit: eaque omnia, quum ea mancipia veneunt, palam recte pronuntianto[2].

Quod si mancipium adversus ea venisset, sive adversus quod

---

[1] As the Aediles, amongst other matters, had the regulation of the markets and of sales and exchanges, it was natural for Justinian to place the discussion of the Aedilitian Edict in a part of the Digest closely following the discussion of *emptio venditio* and the contracts akin to it. It is, however, clear that in Julian's compilation the Aedilitian Edict came last: for the books of the Commentaries of Gaius, Paulus and Ulpian run on too regularly for us to suppose that their notes on the Aedilitian Edict can have filled up any hiatus in their notes upon the Praetorian Edict.

[2] "Verum est *morbum* esse temporalem corporis imbecillitatem, *vitium* vero perpetuum corporis impedimentum." Modestinus in D. 50. 16. 101. 2. See also D. 21. 1. 1. 7. *Morbus* and *vitium* have reference not to mental but to bodily defects; unless the mental defect be such as to act upon the bodily health. D. 21. 1. 1. 9. The defect moreover must be latent, not patent. D. 21. 1. 1. 6: 21. 1. 14. 10.

"*Fugitivus* est qui extra domini domum fugae causa, quo se a domino celaret, mansit." D. 21. 1. 17. pr.

"Proprie *erronem* sic definimus, qui non quidem fugit, sed frequenter sine causa vagatur, et temporibus in res nugatorias consumptis, serius domum redit." D. 21. 1. 17. 14.

dictum promissumve fuerit cum veniret fuisset, quod eius praestari oportere dicetur, emptori omnibusque ad quos ea res pertinet judicium dabimus, ut id mancipium redhibeatur. si quid autem post venditionem traditionemque deterius emptoris opera, familiae, procuratorisve eius factum erit, sive quid ex eo post venditionem natum, adquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat. item si quas accessiones ipse praestiterit, ut recipiat[1].

Item si quod mancipium capitalem fraudem admiserit, mortis consciscendae sibi causa quid fecerit, inve arenam depugnandi causa ad bestias intromissus fuerit, ea omnia in venditione pronuntianto; ex his enim causis judicium dabimus.

Hoc amplius, si quis adversus ea sciens dolo malo vendidisse dicetur, judicium dabimus.

D. 21. 1. 1. pr. U. 1. *ad ed. aed.*

Et quanta pecunia pro eo homine soluta, accessionisve nomine data erit, non reddetur: cuiusve pecuniae quis eo nomine obligatus erit, non liberabitur, *tantae pecuniae judicium dabimus.*

D. 21. 1. 25. 9. U. 1. *ad ed. aed.*

---

[1] "Proponitur actio ex hoc edicto in eum, cujus maxima pars in venditione fuerit, quia plerumque venaliciarii ita societatem coëunt, ut quidquid agunt, in commune videantur agere: aequum enim aedilibus visum est, vel in unum ex his, cujus major pars, aut nulla parte minor esset, aedilicias actiones competere, ne cogeretur emptor cum multis litigare, quamvis actio ex empto cum singulis sit pro portione, qua socii fuerunt." D. 21. 1. 44. 1.

When a false warranty has been given, the *actio redhibitoria* can be brought within six months after the sale or after the right of action accrued: and under the same circumstances an *actio aestimatoria* or *quanti minoris* can be brought within twelve months. D. 21. 1. 19. 6.

If warranty has been omitted, contrary to the provisions of the Aedilitian Edict, an *actio redhibitoria* can be claimed within two months on the mere ground of the omission, or an *actio quanti emptoris interest* within six months, on proof of actual loss. D. 21. 1. 28.

Ne veterator pro novicio veneat[1].

D. 21. 1. 37. U. 1. *ad ed. aed.*

STIPULATIO AEDILITIA.

Illum hominem sanum esse, furem, vespillonem, fugitivum, erronem non esse, furtis noxaque solutum esse praestari, et si quis eum hominem partemve quam ex eo evicerit quominus me (*emptorem*) eumve ad quem ea res pertinebit habere recte liceat, quanti id erit quod ita evictum fuerit, tantam pecuniam duplam dari spondes? Spondeo[2].

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[1] "Praesumptum est enim ea mancipia, quae rudia sunt simpliciora esse, et ad ministeria aptiora, et dociliora; trita vero mancipia et veterana difficile est reformare, et ad suos mores formare." D. 21. 1. 37.

[2] This stipulation is restored on the authority of the first clause of the Aedilitian Edict given above, and by reference to the following passages:

"Si ita quis stipulanti spondeat: *sanum esse, furem non esse, vespillonem non esse* et cetera...Hanc stipulationem: *furem non esse, vespillonem non esse, sanum esse.*" D. 21. 2. 31.

"Cum quis stipulatur: *fugitivum non esse, furem non esse, erronem non esse.*" D. 21. 2. 32. pr.

"In horum emptione solet accedere peculium, aut si excipiet, stipulatio intercedere: *sanum eum esse, furtis noxisque solutum.*" Varro *de Re Rust.* 2. 10. 5.

"Sed si cui horum fuerit adjectum *praestari*, multo magis valere stipulationem." D. 21. 2. 31.

"In stipulatione *duplae*, cum homo venditur, *partis adjectio* necessaria est, quia non potest videri homo evictus, cum pars ejus evicta est." D. 21. 2. 56. 2.

"*Habere liceat.*" See D. 21. 2. 57: 30. 1. 45. 1. &c.

"Emptor stipulatur prisca formula sic...habere recte licere haec sic recte fieri spondesne?" Varro *de Re Rust.* 2. 2. 5.

"Emptori *duplam* promitti a venditore oportet, nisi aliud convenit, non tamen ut satisdetur, nisi specialiter id actum proponatur, sed ut repromittatur." D. 21. 2. 37. pr.

"Non tamen, ut vulgus opinatur, etiam satisdare debet qui *duplam* promittit, sed sufficit nuda repromissio, nisi aliud convenerit." D. 21. 2. 56. pr.

II. DE JUMENTIS.

Qui jumenta vendunt, palam recte dicunto, quid in quoque eorum morbi vitiique sit; utique optime ornata vendendi causa fuerint, ita emptoribus tradentur. si quid ita factum non erit, de ornamentis restituendis, jumentisve ornamentorum nomine redhibendis, in diebus sexaginta, morbi autem vitiive causa inemptis faciendis, in sex mensibus, vel quanto minoris, cum venirent, fuerint, in anno judicium dabimus.

Si jumenta paria simul venierint, et alterum in ea causa fuerit ut redhiberi debeat, judicium dabimus quo utrumque redhibeatur.

D. 21. 1. 38. pr. U. 2 *ad ed. aed.*

Quae de jumentorum sanitate diximus, de cetero quoque pecore omni venditores faciunto.

D. 21. 1. 38. 5. U. 2 *ad ed. aed.*

III. DE FERIS.

Ne quis canem, verrem, vel minorem aprum, lupum, ursum, pantheram, leonem, aliudve quod nocens animal qua vulgo iter fiet ita habuisse velit, ut cuiquam nocere damnumve dare possit. Si adversus ea factum erit, et homo liber ex ea re perierit, solidis ducentis, si nocitum homini libero esse dicetur, quanti bonum aequum judici videbitur condemnetur; ceterarum rerum, quanti damnum datum factumve sit dupli.

D. 21. 1. 40—42. P. 22 *ad ed. aed.* U. 2 *ad ed. aed.*

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